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2545
No. 12001

United States
Court of Appeals
for the Ninth Circuit

GENERAL INSURANCE COMPANY OF
AMERICA, a Corporation,

Appellant,

vs.

HENRY O. LINK, E. W. ELLIOTT and
O. L. GRIMES,

Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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PAUL P. O'BRIEN,
COUNSEL

No. 12001

United States
Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Seattle 4, Washington. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for
the Western District of Washington, Northern
Division

In Admiralty—No. 14378

HENRY O. LINK and E. W. ELLIOTT,
Libelants,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,
Respondent.

LIBEL

The libel of Henry O. Link and E. W. Elliott against the respondent General Insurance Company of America, a corporation, in a cause of contract, civil and maritime, alleges:

I.

That libelants Henry O. Link and E. W. Elliott are now and at all times herein mentioned were respectively the owner and bareboat charterer of the vessel called the "Eastern Prince" and although no other person has an interest in the recovery herein sought under the policy of insurance hereinafter mentioned, said libelants bring this libel on their own behalf and on behalf of all persons who may be interested therein.

II.

That respondent is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of

business in the Western District of Washington, Northern Division, and is authorized and licensed to make insurance contracts, including the insurance hereinafter referred to. That on May 4, 1942, respondent, in consideration of an agreed premium paid therefor, issued its certain policy of insurance, No. MWR 1151, to libelants wherein and whereby respondent insured libelants and the United States of America and agreed to assume [2] and pay all loss or damage resulting to libelants and said vessel as a result of said vessel being in collision, together with general average, salvage and special charges and sue and labor expense incident thereto, consequent upon hostilities or warlike operations (loss payable to O. L. Grimes), all as in said policy of insurance more particularly provided, a photostatic copy thereof being hereto attached, marked Exhibit "A", and by this reference made a part hereof.

III.

That on May 11, 1942, and for some time prior thereto a state of war existed between the United States of America and the Empire of Japan and on said date, while said vessel was proceeding in connection with the prosecution of said war by the United States of America on a voyage from the Port of Seattle, Washington, to the Port of Skagway, Territory of Alaska, with supplies and equipment for a military highway being constructed by the United States of America and while approaching Seymour Narrows and being in all respects

properly navigated, was in collision with the Tanker Roustabout, a Naval vessel of the United States of America then and there being operated in connection with the prosecution of said war in the military and naval service of the United States of America in the transportation of military and naval supplies, to wit, petroleum products, between military and naval bases of the United States in the Territory of Alaska and points of supply on the West Coast of the United States of America; that said collision occurred as the result of the sole fault of said Tanker Roustabout in that the same was negligently and carelessly navigated by failing, as was her duty, to effect a port to port passage with said vessel Eastern Prince and struck said vessel Eastern Prince on her after port quarter. [3]

IV.

That as a result of said collision said vessel Eastern Prince sustained substantial damage to her hull and equipment and was required to proceed to Campbell River and thence to Vancouver, British Columbia, for repairs and libelants incurred or paid charges necessarily incurred in respect thereof in the sum of \$12,301.11, all as more fully appears in the Statement of General and Particular Average prepared on behalf of libelants by W. E. Morrow & Company, Average Adjusters, a copy thereof being filed herewith, marked Exhibit "B," and by this reference made a part hereof.

V.

That there is due and owing to libelants from

respondent on its said policy of insurance the sum of \$11,031.29, all as more fully appears from said Exhibit "B," and although demand accompanied by the submission of said Exhibit "B" was heretofore made on respondent for payment on the 11th day of September, 1942, respondent has refused to pay the same.

VI.

That as more fully appears in said Exhibit "B," libelants have applied for remission of duty payable under United States Revised Statutes, Sec. 3114, and if such remission be not granted an additional ad valorem duty of 50 per cent on the cost of repairs performed on said vessel Eastern Prince will be payable and will be a proper claim against respondent.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court.

Wherefore, libelants pray that process in due form of law according to the practice of this court in causes of admiralty and maritime jurisdiction may issue against respondent General [4] Insurance Company of America, and that it be required to appear and answer upon oath, all and singular, the matters aforesaid; that the court decree payment by respondent to libelants of the sum of \$11,031.29, with interest at six per cent from the 5th day of September, 1942, together with plaintiffs' costs and disbursements herein to be taxed,

and that the court retain jurisdiction for the purpose of ascertaining what further amount, if any, may be payable by respondent in connection with the ad valorem duty aforesaid, and that libelants may have such other and further relief in the premises as in law and in justice they may be entitled to receive.

BOGLE, BOGLE & GATES,
EDWARD G. DOBRIN,
STANLEY B. LONG,
Proctors for Libelants.

[Duly verified.]

EXHIBIT "A"

\$40,000

No. MWR 1151

GENERAL INSURANCE COMPANY
OF AMERICA

Seattle, Washington

By This Policy of Insurance does insure Henry O. Link, Owner; E. W. Elliott (Alaska Division) and United States of America, Charterers, as follows:

In Consideration of the said person or persons effecting this policy promising to pay to the said company the sum of Five Hundred Dollars as a premium at and after the rate of 1.25 per cent for such insurance the said company takes upon itself

Exhibit "A"—(Continued)

the burden of such insurance to the amount of Forty Thousand Dollars and promises and agrees with the assured, their executors and administrators in all respects truly to perform and fulfill the contract contained in this policy. And it is hereby agreed and declared that the said insurance shall be and is an insurance upon—As Per Form Attached—of and in the good.....called the.....or by whatsoever other name or names the said ship is or shall be named or called, lost or not lost, at and from Warranted confined to the waters of Oregon, Washington Coasts, Puget Sound, British Columbia, and Southeastern Alaska, Not West of Cape Spencer.

American Institute

6-Q

Time (Hulls)

July 1, 1941

To be attached to and form a part of Policy No. MWR 1151 of the General Insurance Company.

Dated May 1, 1942.

For Account of Assured but subject to the provisions of this Policy with respect to change of ownership.

Should the Vessel be sold or transferred to other ownership or chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled from date of such sale, transfer, charter, or requisition; provided, however, that in the case of an involuntary transfer by requisition or otherwise, without the prior execution

Exhibit "A"—(Continued)

of any written agreement by the Assured, such cancellation shall take place fifteen days after such transfer; and provided further that if the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, such cancellation shall be suspended until arrival at final port of discharge if with cargo or at port of destination if in ballast. This insurance shall not inure to the benefit of any such charterer or transferee of the Vessel, and if a loss payable hereunder should occur during such period of fifteen days the Underwriters shall be subrogated to all the rights of the Assured against the transferee, by reason of such transfer, in respect to all or part of such loss as is recoverable from the transferee and in proportion which the respective amounts insured bear to the insured value. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of sale, transfer, charter or requisition shall apply even in the case of insurance "for account of whom it may concern".

Loss, if any, payable to O. L. Grimes or order.

In the sum of Forty Thousand Dollars, at and from the 1st day of May, 1942, to the 1st day of August, 1942, beginning and ending with Noon Pacific Standard time.

Provided, however, should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of

Exhibit "A"—(Continued)

destination. On the vessel called the "Eastern Prince" (or by whatsoever name or names the said Vessel is or shall be called).

The said Vessel, for so much as concerns the Assured, by agreement between the Assured and Underwriters in this Policy, is and shall be valued at as follows:

Hull, tackle, apparel, passenger fittings, equipment, stores, ordnance, munitions, boats and other furniture.....\$.....	
Boilers, machinery, refrigerating machinery and insulation and everything connected therewith	Total Value \$ 40,000

Donkey boilers, winches, cranes, windlasses, steering gear and electric light apparatus shall be deemed to be a part of the hull and not of the machinery.

The underwriters to be paid in consideration of this insurance Five Hundred Dollars, being at the rate of 1.25 per cent.

Special Conditions and Warranties:

Warranted confined to the waters of Oregon, Washington Coasts, Puget Sound, British Columbia, and Southeastern Alaska, Not West of Cape Spencer.

In event of non-payment of premium thirty days after attachment this Policy may be cancelled by the Underwriters upon five days written notice being given the Assured.

To return and arrival

~~cents per cent. net for each uncommenced month if it be mutually agreed to cancel this Policy.~~

Exhibit "A"—(Continued)

~~As follows for each consecutive 30 days the~~

Vessel may be laid up in port, viz.:—

cents per cent. net under repair or outside the United States;

cents per cent. net in the United States with cargo on board and not under repair;

cents per cent. net in the United States not under repair, and with no cargo on board excepting while actually loading or discharging.

Provided always: (a) that in no case shall a return be allowed when the within named Vessel is lying in a roadstead or in exposed and unprotected waters.

(b) that in the event of a return for special trade or any other reason, being recoverable, the above rates of return of premium shall be reduced accordingly.

In the event of the Vessel being laid up in port for a period of 30 consecutive days, a part only of which attaches to this Policy, it is hereby agreed that the laying up period, in which either the commencing or ending date of this Policy falls, shall be deemed to run from the first day on which the Vessel, is laid up and that on this basis Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of ~~days attaching thereto bear to thirty.~~ [6]

Beginning the adventure upon the said Vessel, as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port

Exhibit "A"—(Continued)

and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam, motor power or sail; with leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but if without the approval of Underwriters the Vessel be towed, except as is customary or when in need of assistance, or undertakes towage or salvage services under a pre-arranged contract made by Owners and/or Charterers, the Assured shall pay an additional premium if required by the Underwriters but no such premium shall be required for customary towage by the Vessel in connection with loading and discharging. With liberty to discharge, exchange and take on board goods, specie, passengers and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise. Including all risks of docking, undocking, changing docks, or moving in harbor and going on or off gridiron or graving dock as often as may be done during the currency of this Policy.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire. The Underwriters shall be entitled to decide the port to which a damaged Vessel shall proceed for docking or repairing (the actual additional expense of the voyage

Exhibit "A"—(Continued)

arising from compliance with Underwriters' requirements being refunded to the Assured) and Underwriters shall also have a right of veto in connection with the place of repair or repairing firm proposed and whenever the extent of the damage is ascertainable the majority (in amount) of the Underwriters may take or may require to be taken tenders for the repair of such damage.

In cases where a tender is accepted with the approval of Underwriters, an allowance shall be made at the rate of 30 per cent. per annum on the insured value for each day or part thereof from the time of the completion of the survey until the acceptance of the tender provided that it be accepted without delay after receipt of Underwriters' approval.

No allowance shall be made for any time during which the Vessel is loading or discharging cargo or bunkering or taking in fuel.

Due credit shall be given against the allowance as above for any amount recovered:—

(a) in respect of fuel and stores and wages and maintenance of the Master, Officers and Crew or any member thereof allowed in General or Particular Average;

(b) from third parties in respect of damages for detention and/or loss of profit and/or running expenses; for the period covered by the tender allowance or any part thereof.

In the event of failure to comply with the conditions of this clause 15 per cent. shall be deducted from the amount of the ascertained claim.

Exhibit "A"—(Continued)

Warranted that the amount insured for account of the Assured and/or their managers on Disbursements, Commissions and/or similar interests, "policy proof of interest" or "full interest admitted" or on excess or increased value of Hull or Machinery, however described, shall not, except as indicated below, exceed 10 per cent. of the insured valuation of the Vessel, but the Assured may in addition thereto effect "policy proof of interest" or "full interest admitted" insurance on any of the following interests:

(a) Premiums. Any amount not in excess of actual premiums for twelve months on all interests of whatsoever nature insured (including estimated premium on any Protection and Indemnity Insurance), but in all cases reducing monthly by a proportionate amount of the whole, and

(b) Freight and/or Chartered Freight and/or Anticipated Freight and/or Earnings and/or Hire or Profits on Time Charter and/or Charter for series of voyages for any amount not exceeding in the aggregate 15 per cent. of the insured valuation of the Vessel; and if the actual amount at risk on any or all of such interests shall exceed such 15 per cent. of the insured valuation of the Vessel, the Assured and/or their managers may, without prejudice to this warranty, insure whilst at risk the excess of such interests reducing as earned, and

(c) Risks excluded by the "F. C. & S. Clause", and

(d) Loss or damage in consequence of strikes,

Exhibit "A"—(Continued)

lockouts, political or labor disturbances, civil commotions, riots, martial law, military or usurped power or malicious act.

Provided always that a breach of this warranty shall not afford the Underwriters any defense to a claim by mortgagees or other third parties who may have accepted this Policy without notice of such breach of warranty nor shall it restrict the right of the Assured and/or their managers to insure in addition General Average and/or Salvage Disbursements whilst at risk.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, or what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. And in case of any Loss or Misfortune, it shall be lawful for the

Exhibit "A"—(Continued)

Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This insurance also specially to cover (subject to the Average Warranty) loss of or damage to hull or machinery directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel;

Explosions on shipboard or elsewhere;

Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part);

Contact with Aircraft;

Negligence of Master, Charterers, Mariners, Engineers or Pilots;

Provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

And it is further agreed that in the event of salvage, towage or other assistance being rendered

Exhibit "A"—(Continued)

to the Vessel hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership or control of the Vessels) shall be ascertained by arbitration in the manner below provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provision, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

When the contributory value of the Vessel is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the Vessel) or Salvage shall not exceed that proportion of the total contribution due from the Vessel that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the Vessel has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and

Exhibit "A"—(Continued)

these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

In the event of expenditure for Salvage, Salvage Charges or under the Sue and Labor Clause, this Policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the Underwriters are liable, bears to the value of the salvaged property. Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this Policy without any deduction for loss and/or damage shall bear its pro rata share of such expenses or excess of expenses accordingly.

Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to \$4,850, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in

Exhibit "A"—(Continued)

the River Plate (above a line drawn from the North Basin, Buenos Aires, to the mouth of the San Pedro River) or its tributaries, or in the Danube or Demerara Rivers, or on the Yenikale Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the Average be Particular or General.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

The warranty and conditions as to Average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the Vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, Particular Average occurring outside the period covered by this Policy may be added to Particular Average occurring

Exhibit "A"—(Continued)

within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

No recovery for a Constructive Total Loss shall and repairing the Vessel shall exceed the insured value.

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as be had hereunder unless the expense of recovering the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the term covered by this Policy.

And it is further agreed that if the Vessel hereby insured shall come into collision with any other Ship or Vessel and the Assured or the Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or

Exhibit "A"—(Continued)

sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Vessel hereby insured, provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, we will also pay a like proportion of the costs which the Assured or Charterers shall thereby incur, or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners or Charterers of one or both of such Vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of Cross-Liabilities as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and amount of liability

Exhibit "A"—(Continued)

as between the two Vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Hull Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding. Provided always that this clause shall in no case extend to any sum which the Assured or Charterers may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim being made by Charterers under this clause they shall not be entitled to recover in respect of any liability to which the Owners of the Vessel, if interested in this Policy at the time of the collision in question, would not be subject, nor to a greater extent than the Shipowners would be entitled in such event to recover.

The terms and conditions of this form are to be regarded as substituted for those of policy form to which it is attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy.

Exhibit "A"—(Continued)

[Printed in margin of Policy:]

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provisions of the Policy:

F. C. & S. Clause.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise, also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force. [7]

Touching the adventures and perils which the said company is content to bear and does take upon itself, they are of the seas, fires, pirates, rovers, assassins, thieves, jettisons, criminal barratry of the master and mariners, and of all other like perils, losses and misfortunes, that have or shall come to

Exhibit "A"—(Continued)

the hurt, detriment, or damage of the aforesaid subject matter of this insurance or any part thereof.

In case of any loss or misfortune it shall be lawful and necessary for the assured, their factors, servants and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance; the charges whereof the said company shall bear in proportion to the sum hereby insured.

It is expressly declared and agreed that no acts of the said company or assured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Provisions Required by Law to be Stated in This Policy. This Policy is in a Stock Corporation.

In Witness Whereof, this company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized agent of the company.

/s/ W. W. DENT,
President.

/s/ L. E. CROWE,
Secretary,

Countersigned at Seattle, Washington, this 4th day of May, 1942.

PARKER-SMITH COMPANY,
/s/ GRAHAM J. SMITH,
Agent. [8]

Exhibit "A"—(Continued)

THIS POLICY COVERS WAR AND STRIKES
RISKS ONLY AS FOLLOWS AND IS WAR-
RANTED FREE OF ALL OTHER CLAIMS

WAR RISK CLAUSES

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:—

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise; but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and without deduction of new for old. The provisions of the attached policy with respect

Exhibit "A"—(Continued)

to constructive total loss shall apply only to claims arising from physical damage to the insured vessel.

Warranted free of any claim for delay or demurrage and warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured. Also warranted not to abandon in case of blockade and free from any claims for loss or expense in consequence of blockade or of any attempt to evade blockade; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes, or peoples.

Warranted free from any claim arising from capture, seizure, arrests, restraints, detainments, condemnation, preemption or confiscation by the Government of the United States or the Government of any State therein.

The premium paid for this insurance shall not be subject to any return for lay-ups or otherwise.

It is understood and agreed that the "10% Disbursements Warranty" in the within policy is amended to include the words "against the risks herein insured" between the words "described" and "shall".

The "Breach of Warranty" clause in the printed policy is deleted and the following clause substituted therefor—

Exhibit "A"—(Continued)

"Held covered in the event of any breach of warranty as to date of sailing, or deviation, or change of voyage, or other variation of the voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

* * * *

If the vessel be insured under marine policies which include the risks of pirates, claims arising from piracy shall nevertheless be paid under this policy and the underwriters hereof shall have no right to contribution from the underwriters on such marine policies, it being understood that as between the two sets of policies losses due to piracy are payable under marine policies only to the extent that such losses are not collectible under the war risk policies.

* * * *

STRIKES RISK CLAUSE

This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked out workmen, or persons taking part in labor disturbances or riots or civil commotions but this paragraph shall not be construed to include or cover any loss, damage or expense caused by or

Exhibit "A"—(Continued)

resulting from (a) civil war, revolution, rebellion, or insurrection, or civil strike arising therefrom, or (b) delay, detention or loss of use.

Marine 466 3/42 [9]

Marine Department

No. MWR 1151

Expires: August 1, 1942

Am't, \$40,000

Premium, \$500

Assured: Henry O. Link, Owner;

E. W. Elliott Et Al

Vessel: "Eastern Prince"

General Insurance Company of America

Seattle, Washington

Parker-Smith Company

Insurance

Main 2060

Skinner Building

Seattle

EXHIBIT "B"

Clerk's Note: Exhibit "B", Statement of General and Particular Average, Case of S.S. "Eastern Prince", attached to Libel at time of filing, later admitted as Libelant Exhibit 5 at trial of cause, and sent up as part of original exhibits pursuant to order of court.

[Endorsed]: Filed Oct. 19, 1942. [10]

[Title of District Court and Cause.]

EXCEPTIONS OF RESPONDENT TO LIBEL
(Peremptory)

Comes now the respondent above named, General Insurance Company of America, and excepts to the libel herein upon the following grounds:

1. That the facts averred in the libel are not sufficient to constitute a cause of action.

2. That the facts averred in the libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this court.

3. That there is a defect in the parties libelant in that the libel clearly shows that the United States of America and O. L. Grimes are necessary parties to this action.

Dated this 7th day of November, 1942.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
Proctors for Respondent.

[Endorsed]: Filed Nov. 9, 1942. [11]

[Title of District Court and Cause.]

STIPULATION GRANTING LEAVE TO LI-
BELANTS TO FILE AN AMENDED LIBEL

It Is Hereby Stipulated and Agreed between Henry O. Link and E. W. Elliott, libelants in the above entitled action, by and through their proctors, Messrs. Bogle, Bogle & Gates, and General Insurance Company of America, a corporation, by and through its proctors, Skeel, McKelvy, Henke, Evenson & Uhlmann, that said libelants be granted leave to file an amended libel herein.

It Is further Stipulated and Agreed that the exceptions heretofore taken by said respondent to the original libel on file herein be deemed and the same are hereby taken to said amended libel to be filed herein, with leave to respondent to file any supplemental exceptions within 14 days of the filing hereof.

BOGLE, BOGLE & GATES,
Proctors for Libelants.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
Proctors for Respondent.

It Is So Ordered.

Dated at Seattle, Washington, this 12th day of April, 1944.

JOHN C. BOWEN,
Judge.

[Endorsed]: Filed April 12, 1944. [12]

[Title of District Court and Cause.]

AMENDED LIBEL

The libel of Henry O. Link, E. W. Elliott and O. L. Grimes against the respondent, General Insurance Company of America, a corporation, in a cause of contract, civil and maritime, alleges:

I.

That libelants, Henry O. Link and E. W. Elliott, are now and at all times herein mentioned were respectively the owner and bareboat charterer of the vessel called the "Eastern Prince," and O. L. Grimes is the loss payee under the policy of insurance hereinafter mentioned, and although no other person has an interest in the recovery herein sought under the said policy of insurance, said libelants bring this libel on their own behalf and on behalf of all persons who may be interested therein.

II.

That respondent is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division, and is authorized and licensed to make insurance contracts, including the insurance hereinafter referred to. That on May 4, 1942, respondent, in consideration of an agreed premium paid therefor, issued its certain policy of insurance, No. MWR 1151, [13] to libelants, wherein and whereby respondent insured libelants and the

United States of America and agreed to assume and pay all loss or damage resulting to libelants and said vessel as a result of said vessel being in collision, together with general average, salvage and special charges and sue and labor expense incident thereto, consequent upon hostilities or war-like operations (loss payable to O. L. Grimes), all as in said policy of insurance more particularly provided, a photostatic copy thereof being attached to the original libel on file herein, marked Exhibit "A," and by this reference made a part hereof.

III.

That on May 11, 1942, and for some time prior thereto, a state of war existed between the United States of America and the Empire of Japan and on said date, while said vessel was proceeding in connection with the prosecution of said war by the United States of America on a voyage from the Port of Seattle, Washington, to the Port of Skagway, Territory of Alaska, with supplies and equipment for a military highway being constructed by the United States of America and while approaching Seymour Narrows and being in all respects properly navigated, was in collision with the U.S.S. (Tanker) Roustabout. That at the time of said collision the U.S.S. Roustabout was a duly commissioned Naval vessel of the United States of America employed solely for Naval purposes as a regularly commissioned tanker of the United States Navy, operated by the Navy Department, and officered by commissioned officers of the United States

Navy and manned by a United States Navy crew, and armed with anti-aircraft guns and other armaments and ammunition for use in connection therewith. That the said U.S.S. Roustabout at the time of said collision was engaged in her aforesaid public employment and operated in connection with the prosecution of said war in the [14] military and Naval service of the United States of America in the transportation of military and Naval supplies, to wit, fuel oil, gasoline and other petroleum products, between military and naval bases on the West coast of the United States of America to military and Naval bases of the United States in the Territory of Alaska for use by combatant Naval vessels and aircraft of the United States of America; that said collision occurred as the result of the sole fault of said U.S.S. Roustabout in that the same was negligently and carelessly navigated by failing, as was her duty, to effect a port to port passage with said vessel Eastern Prince and struck said vessel Eastern Prince on her after port quarter.

IV.

That as a result of said collision said vessel Eastern Prince sustained substantial damage to her hull and equipment and was required to proceed to Campbell River and thence to Vancouver, British Columbia, for repairs and libelants incurred or paid charges necessarily incurred in respect thereof in the sum of \$12,301.11, all as more fully appears in the Statement of General and Particular Average prepared on behalf of libelants by W. E. Mor-

row & Company, Average Adjusters, a copy thereof being on file herein, marked Exhibit "B," and by this reference made a part hereof.

V.

That there is due and owing to libelants from respondent on said policy of insurance the sum of \$11,031.29, all as more fully appears from said Exhibit "B," and although demand accompanied by the submission of said Exhibit "B" was heretofore made on respondent for payment on the 11th day of September, 1942, respondent has refused to pay the same.

VI.

That as more fully appears in said Exhibit "B," libelants [15] have applied for remission of duty payable under United States Revised Statutes, Sec. 3114, and if such remission be not granted an additional ad valorem duty of 50 per cent on the cost of repairs performed on said vessel Eastern Prince will be payable and will be a proper claim against respondent.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court.

Wherefore, libelants pray that process in due form of law according to the practice of this court in causes of admiralty and maritime jurisdiction may issue against respondent, General Insurance Company of America, and that it be required to appear and answer upon oath, all and singular, the

matters aforesaid; that the court decree payment by respondent to libelants of the sum of \$11,031.29, with interest at six per cent from the 5th day of September, 1942, together with libelants' costs and disbursements herein to be taxed, and that the court retain jurisdiction for the purpose of ascertaining what further amount, if any, may be payable by respondent in connection with the ad valorem duty aforesaid, and that libelants may have such other and further relief in the premises as in law and in justice they may be entitled to receive.

BOGLE, BOGLE & GATES,
STANLEY B. LONG,
THOMAS L. MORROW,
Proctors for Libelants. [16]

[Duly verified.]

[Endorsed]: Filed April 12, 1944. [17]

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard on January 3, January 31, February 2 and May 6, 1944, upon respondent's exceptions to the libel likewise being taken to the amended libel by stipulation of the parties and so ordered by the Court on the 12th day of April, 1944, the said libelants appearing by and through their proctors, Messrs. Bogle, Bogle & Gates and Thomas L. Morrow, and the respondent appearing by and through its proctors, Skeel, Mc-

Kelvy, Henke, Evenson & Uhlmann, and the Court having heard oral argument and considered written briefs on file herein and being fully advised in the premises, now, therefore, it is

Ordered that said respondent's exceptions to the libel, as amended, be and the same are hereby overruled; and it is further.

Ordered that pages 3 and 4 of libelants' Exhibit B, purporting to be the statement of the master of the vessel Eastern Prince, be and the same is hereby ordered stricken; and it is further

Ordered that page 20 of said Exhibit B, purporting to be a letter from the owner's counsel, be and the same is hereby ordered stricken; and it is further

Ordered that respondent be allowed ten days in which to answer the amended libel on file herein.

To all of which respondent excepts and its exception is allowed.

Done in open Court this 26th day of June, 1944.

JOHN C. BOWEN,

Judge.

Presented by:

THOMAS L. MORROW,

Proctors for Libelants.

Approved as to form:

SKEEL, McKELVY, HENKE,

EVENSON & UHLMANN,

Proctors for Respondent.

By THOS. D. KELLY.

[Endorsed]: Filed June 26, 1944. [19]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT

Comes now the respondent above named, General Insurance Company of America, a corporation, and answering the amended libel of the libelants herein denies, admits and alleges as follows:

I.

Answering paragraph I of said amended libel, this respondent does not have sufficient information or knowledge to form a belief as to the truth or falsity thereof, and therefore denies the same.

II.

Answering paragraph II of said amended libel, the respondent admits the same.

III.

Answering paragraph III of said amended libel, the respondent admits that on May 11, 1942, and for some time prior thereto, a state of war existed between the United States of America and the Empire of Japan. That as to all other allegations in said paragraph contained, this respondent does not have sufficient information or knowledge to form a belief as to the truth or falsity thereof and, therefore, denies the same. [20]

IV.

Answering paragraph IV of said amended libel, this respondent does not have sufficient information or knowledge to form a belief as to the truth or falsity of any of the allegations therein contained, and, therefore, denies the same.

V.

Answering paragraph V of said amended libel, the respondent denies the same and each and every part thereof except that respondent admits that demand was made for payment as therein recited and that said payment was refused by respondent, and particularly denies that the respondent is indebted to the libelants or any of them in the sum of \$11,031.29 or in any sum whatsoever.

VI.

Answering paragraph VI of said amended libel, this respondent does not have sufficient information or knowledge to form a belief as to whether or not application for remission of duty payable to the United States has been made as therein recited and, therefore, denies the same, and the respondent expressly denies that if any such claim is disallowed it or any part thereof will be a proper claim against this respondent by the libelants or any of them.

VII.

Answering paragraph VII of said amended libel herein, the respondent admits the jurisdiction of the Court and denies any other allegations therein contained incorporating any prior statements made in said amended libel, all of which are answered as hereinabove recited. [21]

Wherefore, the respondent prays that the amended libel be dismissed and that the respondent

recover its costs and disbursements herein to be taxed according to law.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
HARRY HENKE, JR.,
Proctors for Respondent.

[Duly verified.]

[Endorsed]: Filed July 11, 1944. [22]

[Title of District Court and Cause.]

STIPULATION OF FACTS RE AMOUNT
OF LOSS

Without prejudice to the issue of whether or not the loss sustained by the libelants as a result of the collision between the Eastern Prince and the USS Roustabout on May 11, 1942, and the damages to said Eastern Prince as a result thereof, are within the coverage of respondent's war risk policy in evidence herein as Libelants' Exhibit 1, and without admission by respondent that such loss should be construed as liquidated damages, the above named libelants and respondent through their respective undersigned proctors of record, hereby stipulate and agree to the following facts as evidence in the above case, and waive further proof thereof, to wit:

1. That the "Statement of General and Particular Average Case of the SS 'Eastern Prince' " prepared by W. E. Morrow & Company, average ad-

justers, dated September 5, 1942, may be admitted in evidence in this cause as Libelants' Exhibit 5, insofar as the items of loss, damage and disbursements, and average computations therein recited are concerned, but excluding opinions of counsel as to liability and all extraneous matters not material to the recitals of loss, damage and disbursements, and computations [23] of the average adjustment.

2. That the fair value of the Eastern Prince in its damaged condition at Vancouver, British Columbia, on May 15, 1942, was the sum of \$29,375.39 (U. S.).

3. That the value of the cargo, including freight on board the Eastern Prince, on May 11, 1942, and at Vancouver, British Columbia May 15, 1942, was the sum of \$30,000 (U. S.).

4. That as a result of the collision between the Eastern Prince and the USS Roustabout in Discovery Passage, B. C., on May 11, 1942, and the damages sustained by the Eastern Prince as a consequence thereof, libelants incurred and paid reasonable and necessary charges and expenses (particular average) for repairs, towage, salvage and other services for and on behalf of the Eastern Prince in the amount of \$9,903.07 (U. S.) and reasonably expended the sum of \$179.27 (U. S.) for survey fees and expenses in connection with the repairs of said vessel, all as is more particularly shown and detailed in said "Statement of General and Particular Average" (Libelants' Exhibit 5).

5. That as a result of the collision between the

Eastern Prince and the USS Roustabout in Discovery Passage, B. C., May 11, 1942, and the damages sustained by the Eastern Prince as a consequence thereof, libelants incurred and paid reasonable general average charges and expenses for the benefit of said vessel and her cargo in the amount of \$1,918.08, all as is more particularly shown and detailed in said "Statement of General and Particular Average" (Libelants' Exhibit 5).

6. That the vessel's (Eastern Prince's) proportion of said general average expense is the sum of \$948.95 as is properly shown and computed in said "Statement of General and Particular [24] Average" (Libelants' Exhibit 5).

7. That the principal amount of libelants' loss and claim against respondent for particular and general average charges and disbursements occasioned by said collision and the damages resulting to the Eastern Prince in consequence thereof, is the sum alleged in the amended libel herein (paragraph V), to wit, the sum of \$11,031.29.

BOGLE, BOGLE & GATES,
STANLEY B. LONG,
THOS. L. MORROW,

Proctors for Libelants.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ HENRY HENKE, JR.,

Proctors for Respondent.

[Title of District Court and Cause.]

OPINION, FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Libel by Henry O. Link, E. W. Elliott and O. L. Grimes to recover on war risk policy issued by respondent, General Insurance Company of America.

The testimony as to the nature of the cargo aboard the Roustabout at the time of the collision is rather indefinite. We learn, however, from the witnesses that during a period of time including the month of May, 1942, the Roustabout was engaged in the service of the United States Navy in transporting from Seattle and nearby bases to war bases in southeastern Alaska, petroleum products, bombs, ammunition and other dry cargo for the use of the Armed Forces in carrying on the prosecution of the war with Japan. Her operations also included transporting from Alaskan bases to bases in Seattle and vicinity, such freight as was offered by the Navy or Coast Guard consisting generally of empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks, automobiles, torpedo cases and defective ammunition. The collision out of which this controversy arose occurred about [26] 2:00 a.m. of May 11, 1942, off a place known to mariners as Campbell River Bluff opposite Campbell River which empties into Discovery Passage in Canadian waters.

Judge Bowen in ruling upon the exceptions to the libel (56 F. Supp. 275) carefully considered Ameri-

can and English cases on the questions here involved. He referred to *Queen Ins. Co. v. Globe Ins. Co.*, 263 U. S. 487, 44 S. Ct. 175, as holding that in deciding whether marine loss is covered by a war risk clause two principles are to be considered. One is that we "generally are to stop our inquiries with the cause nearest to the loss." The other is that for expediency and harmony in the marine insurance world, the American courts should follow the English courts' decisions. The *Queen* case arose out of a collision between merchant vessels in convoy and it was held that the loss could not be attributed to warlike operations.

The facts here are somewhat similar to those in *Board of Trade v. Hain Steamship Co., Ltd.*, English Commercial Cases, vol. 35, p. 29 (1929) A. C. 534, the facts in that case being as follows:

"The respondents were the owners of a steamship, the *Trevanion*, which during the War was requisitioned by the Crown under the terms of the charterparty T. 99, by which the Crown accepted responsibility for loss or damage which was the consequence of hostilities or warlike operations. On the night of December 25, 1918, after the Armistice had been concluded, the *Trevanion* was in collision with an American steamer, the *Roanoke*, the collision being due to the negligence of both vessels. At the time of the collision the *Trevanion* was admittedly not engaged in a warlike operation. The respondents claimed damages from the Crown, and their claim was referred to arbitration. The arbitrator found as a fact that the *Roanoke* was engaged in a war-

like operation at the time of the collision and that, although both vessels had been negligent, the respondents were entitled to recover on the ground that the damage was the result of a warlike operation. On appeal by special case Rowlatt J. reversed the decision of the arbitrator, but his decision was reversed on appeal to the Court of Appeal." The Crown appealed to the House of Lords where the appeal was dismissed, the holding being that the collision was the consequence of a warlike operation.

In *Yorkshire Dale Steamship Co., Ltd., v. Minister* [27] of War Transport, *The Times Law Reports*, June 5, 1942, p. 263, referred to by Judge Bowen as *The Coxwold Case*, Lord Porter reviewed English cases saying:

"(1) In this as in every other insurance problem the proximate cause is alone to be looked at. *Ionides v. Universal Marine Insurance Company*, (1863) 14 C.B.N.S. 259. (2) But the proximate cause is not necessarily the nearest in point of time; it is the dominant cause. *Leyland Steamship Company, Limited, v. Norwich Union Fire Insurance Society* (34 *The Times L. R.* 221; (1918) A.C. 350), *Samuel v. Dumas* (40 *The Times L. R.* 375; (1924) A.C. 431). (3) In the case of a ship proceeding on a voyage which is not itself a warlike operation, absence of lights, sailing in convoy, and zigzagging are not separately or in combination a warlike operation, nor indeed is it a warlike operation to follow the course set by the naval officer in charge of the convoy. *The Petersham and the Matiana* (36 *The Times L. R.* 791; (1921) 1 A.C. 99). (4) The dimming or

extinguishing of a shore light is a warlike operation, but if a ship engaged in a mercantile operation goes ashore because she is out of her reckoning, she is not lost by the warlike operation merely because she would most probably have realized and avoided the danger had the light been seen. *Ionides v. Universal Marine Insurance Company* (supra). (5) A ship carrying war stores from one war base to another is engaged on a warlike operation. *The Geelong* (39 *The Times L. R.* 133; (1923) *A. C.* 191). (6) A collision caused by a ship so engaged is caused by the warlike operation. *Attorney-General v. Ard Coasters* (37 *The Times L. R.* 692; (1921) 2 *A.C.* 141). (7) A collision solely caused by a ship engaged on a mercantile adventure is not caused by a warlike operation even though that ship collides with or is struck by one engaged on a warlike operation. *The Clan Matheson* (45 *The Times L. R.* 408; (1929) *A.C.* 514). (8) If the collision be caused both by the ship so engaged and by one not so engaged so that both were effective causes of the disaster the consequent loss is due to the warlike operation. *Board of Trade v. Hain Steamship Company* (45 *The Times L. R.* 550; (1929) *A.C.* 534). (9) The collision if due in whole or in part to the action of the ship engaged in a warlike operation does not cease to be caused by the warlike operation by reason of the fact that that action is negligent. *The Warilda* (39 *The Times L. R.* 333; (1923) *A.C.* 292)."

The concluding remarks of Lord Porter in the *Coxwold* case illustrate the principles which distin-

guish this case from the Queen Insurance and other cases cited by respondent. He summarized as follows:

“If the Coxwold had been on an ordinary mercantile voyage no doubt, as a result of the decisions in your Lordships’ House, the risk would be a marine one, whether its cause was absence of lights, or sailing in convoy, or obeying the orders of the Commodore vessel, or inability to see the Neist Light because it was dimmed. But in the circumstances the case of the Coxwold being at that place at that time in those conditions was her warlike operation and the loss was in my view not only in the course of but caused by that operation. [28]

“That the Court of Appeal thought otherwise was, I venture to suggest, due to the importance which they attached to the arbitrator’s finding as to the set of the tide as against the totality of circumstances on which he relied. Moreover, in my view, they did not give sufficient weight to the fact, as admitted and found, that the warlike operation consisted in sailing from one war base to another.”

At the time of the collision with the Eastern Prince and for some time prior thereto and thereafter, the Roustabout was a commissioned vessel in the United States Navy officered and manned with naval personnel. At no time during this period was she engaged in carrying commercial cargo. The Roustabout’s operations and character differ from those of the Napoli of the Queen Insurance case and some of the other cases involving merchant ships.

Here the evidence shows the usual cargo carried by the Roustabout in both directions between Seattle and the Alaskan war bases. The fact that an officer and member of the crew testified that they could not specifically describe the cargo aboard the vessel at the time of the collision seems of little consequence. We have but little, if any, evidence describing the cargo aboard the Roustabout at the time of the collision but we are informed as to the nature of the cargo generally carried by the Roustabout on her return trips from Alaskan bases to Seattle. Considering the facts established by the evidence here as similar facts were considered in the Roanoke case (*Board of Trade v. Hain Steamship Co., Ltd.*, *supra*), we have no right in law or in fact to assume without evidence that the Roustabout was not engaged on the duty of the service of which she formed part of the Navy.

The collision of the vessels Roustabout and Eastern Prince was due in part to the action of the Roustabout in a warlike operation. The damage to insureds' vessel, Eastern Prince, was a consequence of warlike operations of the [29] Roustabout, a duly commissioned vessel of the United States Navy officered and manned by naval officers and crew and operated by the Navy in aid of the prosecution of the war with Japan. The collision was a result of mutual fault of both vessels.

The Court, having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, Now Finds the Facts and States Conclusions of Law as Follows:

FINDINGS OF FACT

1. That libelants, Henry O. Link and E. W. Elliott, are now and at all times herein mentioned were respectively the owner and bareboat charterer of the vessel called the *Eastern Prince*.

2. That respondent, General Insurance Company of America, is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division, and is authorized and licensed to make insurance contracts, including the insurance herein-after referred to. That on May 4, 1942, respondent in consideration of an agreed premium paid therefor, issued its certain policy of insurance, No. MWR 1151, to libelants, wherein and whereby respondent insured libelants and the United States of America and agreed to assume and pay all loss or damage resulting to libelants and said vessel as a result of said vessel being in collision, together with general average, salvage and special charges and sue and labor expense incident thereto, consequent upon hostilities or warlike operations (loss payable to O. L. Grimes).

3. That on May 11, 1942, and for some time prior [30] thereto, a state of war existed between the United States of America and the Empire of Japan and on said date, while said vessel, the *Eastern Prince*, was proceeding on a voyage from the Port of Seattle, Washington, to Prince Rupert, first port of call, with supplies and equipment for the Alaska Road up the inside passage to Alaska for the Elliott

Steamship Company, and while off Campbell River Bluff opposite Campbell River was in collision with the United States tanker Roustabout; that at the time of said collision the USS Roustabout was a duly commissioned naval vessel of the United States of America employed solely for naval purposes as a regularly commissioned tanker of the United States Navy Department and officered by commissioned officers of the United States Navy and manned by a United States Navy crew, and armed with anti-aircraft guns and other armaments and ammunition for use in connection therewith. That the USS Roustabout at the time of said collision was engaged in her aforesaid public employment and operated in connection with the prosecution of said war in the military and naval service of the United States of America in the transportation of military and naval supplies, to-wit, fuel oil, gasoline and other petroleum products, between military and naval bases on the west coast of the United States of America to military and naval bases of the United States in the Territory of Alaska for use by combatant naval vessels and aircraft of the United States of America; and that on southbound trips from said naval bases in the Territory of Alaska, the said USS Roustabout engaged in carrying cargo consisting of freight offered by the Navy or Coast Guard, empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles, and at the time of said collision, the [31] said vessel

had aboard water ballast and miscellaneous dry cargo of the nature just above described.

4. That the site of the collision is a narrow channel under the International Rules.

5. That at the time of said collision the USS Roustabout was at fault as follows:

- (a) Failing to keep to the right of the channel;
- (b) Failing within sight of the Eastern Prince to indicate a change of course on her whistle;

(c) Failing to keep a proper lookout in that the lookout aboard the Roustabout after sighting the red light of the Eastern Prince took no action concerning same and failed to notify the officer on the bridge of the whereabouts of the Eastern Prince.

6. That at the time of said collision the SS Eastern Prince was at fault as follows:

(a) Failure to exhibit red and green navigation lights, view of the same being obstructed by deck load consisting of construction material, lumber, etc.

7. That libelants suffered loss for particular and general average charges and disbursements occasioned by said collision and the damages resulting to the Eastern Prince in consequence thereof in the sum of \$11,031.29.

CONCLUSIONS OF LAW

From the foregoing facts the Court decides:

1. That at the time of the collision between the USS Roustabout and libelants' vessel, Eastern Prince, the Roustabout was a duly commissioned naval vessel of the United States employed solely for naval tanker purposes, officered and manned by naval officers and crew and operated by the United

States Navy and engaged in warlike operations.

2. That the collision and damage resulting therefrom to libelants' vessel, Eastern Prince, was a consequence of Roustabout's warlike operations.

3. That the said collision occurred by reason of the [32] mutual fault of both vessels.

4. That libelants are entitled to judgment against respondent in the sum of \$11,031.29 together with costs and disbursements.

Let Judgment Be Entered Accordingly.

Dated this 24th day of February, 1948.

ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed Feb. 27, 1948. [33]

In the District Court of the United States for the
Western District of Washington, Northern
Division

In Admiralty—No. 14378

HENRY O. LINK, E. W. ELLIOTT
and O. L. GRIMES,

Libelants,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,

Respondent.

FINAL DECREE

This cause having come on for trial July 16, 1947, upon the pleadings and suit, and libelants being represented by its proctors, Bogle, Bogle & Gates, Stanley B. Long and Thomas L. Morrow, and respondent being represented by its proctors, Skeel, McKelvy, Henke, Evanson & Uhlmann and Harry Henke, Jr., and witnesses for the parties having been sworn and having testified in open court, and exhibits having been offered and admitted as evidence, and the court being fully advised and having considered all thereof, after oral argument, and having rendered its oral opinion herein and entered its findings of fact and conclusions of law on the 24th day of February, 1948 pursuant to Supreme Court Admiralty Rule 46 $\frac{1}{2}$; now, therefore, on motion of proctors for libelants, it is hereby

Ordered, adjudged and decreed, that the libelants

recover of and from respondent, General Insurance Company of America, the sum of \$11,031.29 with interest thereon at six percent (6%) from the 11th day of September, 1942, together with libelants' costs in the sum of \$93.70, and it is here further

Ordered, adjudged and decreed that unless this decree be satisfied, or proceedings thereon stayed by an appeal within ten days after entry of this decree with notice of entry on the respondent or its proctors, the libelants have execution against the [34] respondent and his stipulator for costs, gifts, chattels, land, forthwith to satisfy this decree.

Done in open court this 17th day of May, 1948.

/s/ ROGER T. FOLEY,
Judge.

Approved as to form:

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
By /s/ DONALD S. VOORHEES,
Proctors for Respondent.
BOGLE, BOGLE & GATES,
By THOMAS L. MORROW,
Proctors for Libelants.

Presented by:

THOMAS L. MORROW,
of Bogle, Bogle & Gates,
Proctors for Libelants.

(Entered on Admiralty Docket May 20, 1948.)

[Endorsed]: Filed May 20, 1948. [35]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judge of the District Court of
the United States for the Western District of
Washington, Northern Division:

Your petitioner, who is the respondent in the
above entitled cause, prays that it may be permitted
to take an appeal from the final decree entered in
the above cause on the 20th day of May, 1948, to
the United States Circuit Court of Appeals for the
Ninth Circuit for the reasons specified in the As-
signment of Errors which is filed herewith.

Your petitioner further prays that said appeal
shall operate as a supersedeas, and therefore prays
that an order be made fixing the amount of security
which said respondent shall give and furnish upon
such appeal, and that upon giving such security all
further proceedings in this court be suspended and
stayed until the determination of said appeal by
the United States Circuit Court of Appeals for the
Ninth Circuit.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ HARRY HENKE, JR.,
Attorneys for Respondent.

[Endorsed]: Filed June 22, 1948. [36]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the said General Insurance Company of America, respondent in the above entitled cause, and filed the following assignment of errors, upon which it will rely in the prosecution of appeal herewith petitioned for in said cause from the decree of this court entered on the 20th day of May, 1948:

1. The court erred in its conclusion of law that the USS Roustabout was engaged in warlike operations at the time of its collision with libelants' vessel, the MV Eastern Prince.

2. The court erred in its conclusion of law that the collision and damage resulting therefrom to libelants' vessel, the MV Eastern Prince, was a consequence of warlike operations of the USS Roustabout.

3. The court erred in its conclusion of law that the collision between the MV Eastern Prince and the USS Roustabout was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the MV Eastern Prince and that libelants were entitled to judgment against respondent upon that policy of insurance.

4. The court erred in its conclusion of law that at the time of the collision the USS Roustabout was employed solely [37] for naval tanker purposes.

5. The court erred in its finding that at the time of the collision the USS Roustabout had aboard dry cargo of the nature of empty containers, oil drums, empty acetylene and oxygen tanks, damaged

airplane motors, damaged airplanes, trucks and automobiles.

6. The court erred in finding that at the time of said collision the USS Roustabout and the MV Eastern Prince were both at fault.

7. The court erred in finding that the said collision occurred by reason of the mutual fault of both vessels.

8. The court erred in granting to libelants interest upon their judgment from the 11th day of September, 1942, rather than from the date of entry of the final decree in this cause.

9. The court erred in overruling respondent's exception to the sufficiency of the libel and in holding that the amended libel stated a cause of action.

Wherefore, on account of the errors hereinabove assigned, petitioner prays that the said decree of the District Court of the United States for the Western District of Washington, Northern Division, entered on the 20th day of May, 1948, in the above entitled cause, be reversed, and that a decree be entered in favor of the respondent.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ HARRY HENKE, JR.,
Attorneys for Respondent.

[Endorsed]: Filed June 22, 1948. [38]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The petition of respondent in the above-entitled cause for an appeal from the final decree entered therein is hereby granted and the appeal is allowed; and upon petitioner filing a bond in the sum of Twenty-five Thousand (\$25,000.00) Dollars with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the decree made and entered in the above cause, and shall suspend and stay all further proceedings in this court until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 25th day of June, 1948.

ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed June 30, 1948 [39]

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND

Know all men by these presents:

That we, General Insurance Company of America, a corporation, and General Casualty Company

of America, a corporation authorized to act as sole corporate surety under the laws of the State of Washington, are held and firmly bound unto Henry O. Link, E. W. Elliott and O. L. Grimes, libelants above named, in the sum of Twenty-five Thousand (\$25,000.00) Dollars, lawful money of the United States, to be paid to the said Henry O. Link, E. W. Elliott and O. L. Grimes, their executors, administrators and successors, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seals and dated this 30th day of June, 1948.

Whereas, the above-named General Insurance Company of America has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the United States District Court for the Western District of Washington, Northern Division, in the above-entitled [40] cause in favor of libelants and against respondent in the sum of Eleven Thousand Thirty-One and 29/100 (\$11,031.29) Dollars, together with costs;

Now therefore, the condition of this obligation is such that if the above-named General Insurance Company of America shall prosecute its said appeal to effect and answer all costs and damages, and pay the judgment of the District Court, if it fail to

make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

GENERAL INSURANCE
COMPANY OF AMERICA,

By RALPH H. BALDWIN,
Vice President.

(Seal) H. W. EWART,
Assistant Secretary.

GENERAL CASUALTY
OF AMERICA,

(Seal) By ANTONY PANELLA,
Attorney-in-Fact.

Approved and presented by:
SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By DONALD S. VORHEES.

The foregoing bond is hereby approved this 8th day of July, 1948.

JOHN C. BOWEN,
Judge.

[Endorsed]: Filed July 8, 1948. [41]

[Title of District Court and Cause.]

STIPULATION AUTHORIZING TRANSMITTAL OF ORIGINAL EXHIBITS

It is hereby stipulated and agreed by and between Henry O. Link, E. W. Elliott and O. L. Grimes,

libelants in the above entitled action, by and through their proctors, Bogle, Bogle & Gates, and General Insurance Company of America, a corporation, by and through its proctors, Skeel, McKelvy, Henke, Evenson & Uhlmann, that the original exhibits introduced at the trial of the above entitled action shall be included in the apostles on appeal but shall not be printed as part of the printed apostles on appeal.

BOGLE, BOGLE & GATES,
THOMAS L. MORROW,

Proctors for Libelants.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

HARRY HENKE, JR.,
Proctors for Respondent.

It is so ordered.

Done in open court this 22nd day of July, 1948.

JOHN C. BOWEN,
Judge.

[Endorsed]: Filed July 22, 1948. [42]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF CON- TENTS OF APOSTLES ON APPEAL

Come now the appellants and hereby designate the following portions of the record to be included in the apostles on appeal:

1. The style of the court.
2. The names of the parties.
3. The libel together with the exhibits annexed thereto.

4. Exceptions of respondent to libel (peremptory).

5. Stipulation granting leave to libelants to file an amended libel.

6. Amended libel.

7. Order of June 26, 1944, overruling respondent's exceptions to the amended libel.

8. Answer of respondent.

9. The testimony as taken on the part of the libelant and any exhibits annexed thereto.

10. The testimony as taken on the part of the respondent and any exhibits annexed thereto.

11. Stipulation of facts re amount of loss.

12. Opinion, Findings of Fact, and Conclusions of Law.

13. Final decree [43]

14. Petition for appeal.

15. Assignment of errors.

16. Order allowing appeal.

17. Citation.

18. Supersedeas bond.

19. Appellants' designation of contents of apostles on appeal.

Dated at Seattle, Washington, this 12th day of July, 1948.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
By HARRY HENKE, JR.,
Attorneys for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed July 13, 1948. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages number 1 to 44, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcripts of Proceedings and Testimony, the originals of which are sent up as part of this record, together with the original exhibits which are certified under separate certificate, constitute the apostles on appeal from the Decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges [45] incurred in my office for preparing record on appeal in this cause, to-wit: 3 pages at 40c, \$1.20; 40 pages at 10c, \$4.00; Notice of Appeal, \$5.00; total, \$10.20.

I further certify that the above amount has been paid to me by the attorneys for the Appellant.

I further certify that there is attached to the apostles the original Citation on Appeal issued by this Court.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District this 28th day of July, 1948.

(Seal) MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy. [46]

[Title of District Court and Cause.]

CITATION

United States of America—ss.

To: Henry O. Link, E. W. Elliott, and O. L. Grimes,
Greetings:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit within forty (40) days from the date hereof pursuant to an order allowing an appeal from the District Court of the United States for the Western District of Washington, Northern Division, in a suit wherein the General Insurance Company of America is appellant, and you are appellees, to show cause, if any there be, why the final decree rendered against said General Insurance Company of America should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Roger T. Foley, judge of the District Court of the United States, this 25th day of June, 1948, and in the 172nd year of the independence of the United States of America.

(Seal) /s/ ROGER T. FOLEY,

Judge of the District Court for the Western District of Washington, Northern Division.

[Endorsed]: Filed June 30, 1948. [47]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of Washington,
County of King—ss.

Donald S. Voorhees, being first duly sworn, on oath deposes and states: That during all times herein mentioned he was and now is a citizen of the United States and a resident of the State of Washington and over the age of 21 years; that he is not a party to the above-entitled action, nor interested therein; and that he is competent to be a witness in this cause.

Affiant states that on the 8th day of July, 1948, affiant served the libelants with a copy of the citation in the above-entitled action, leaving a copy of the said citation in the hands of Thomas L. Morrow,

one of the proctors for libelants, in the offices of Bogle, Bogle and Gates, proctors for libelants.

Further affiant sayeth not.

/s/ DONALD S. VOORHEES.

Subscribed and sworn to before me this 9th day of July, 1948.

(Seal) /s/ A. P. CURRY,

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed July 27, 1948. [48]

In the District Court of the United States for
the Western District of Washington, Northern
Division

In Admiralty—No. 14378

HENRY O. LINK, E. W. ELLIOTT, and O. L.
GRIMES,

Libelants,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,

Respondent.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Before: The Honorable John C. Bowen, District
Judge.

Seattle, Washington

July 16th, 1947, 10:00 a.m.

Appearances: Stanley B. Long, Esq., and Thomas
L. Morrow, Esq. (Messrs. Bogle, Bogle & Gates,

Seattle, Washington), appearing as Proctors for Libelants; Harry Henke, Jr., Esq. (Messrs. Skeel, McKelvy, Henke, Evenson & Uhlmann, Seattle, Washington), appearing [1*] as Proctors for Respondent.

Whereupon, evidence was given and proceedings were had as follows, to wit: [2]

The Court: The case of Henry O. Link, E. W. Elliott, and O. L. Grimes versus General Insurance Company; are you ready for trial?

Mr. Long: All parties are ready, your Honor.

Mr. Henke: Ready.

Mr. Long: I should like to hand the Court the Libelants' Trial Memorandum, a copy of which has been served upon counsel for the respondent.

Mr. Henke: We have a trial memorandum which will be here very shortly, your Honor.

The Court: Thank you.

Mr. Long: It might be helpful to the Court if I would make a brief opening statement. I don't feel it will be necessary to go into any particular detail but it would help, I believe, to acquaint the Court with the issue and the problem involved in this case.

I may say that this is a companion case, if your Honor please, to the case which your Honor tried yesterday, that case being entitled Henry O. Link and others versus the United States of America. In other words, the issues arise out of the same

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

collision between the USS Roustabout, a Naval vessel, and the Motor Vessel Eastern Prince. So that the collision which occurred between those two vessels on [3] May 11th, 1942, is what gives rise to both cases—the one your Honor heard yesterday and the case which is now before your Honor this morning.

This case, if your Honor please, is an action brought by Mr. Link, Mr. Elliott, and Mr. Grimes as assureds under a certain war risk policy covering the Motor Vessel Eastern Prince, issued by the respondent General Insurance Company of America and in effect and in full force at the time of the collision on May 11th, 1942. The basic question in the case is as to whether or not the damage suffered by the Eastern Prince—the vessel insured under the policy—is damage of such a character and occasioned by risks covered under the war risk policy issued by the respondent.

The issuance of the policy, a copy of which is attached to the libel, is admitted by the respondent in Paragraph 2 of their Answer to Paragraph 2 of the Amended Libel. The original policy will be introduced in evidence.

This case, if I might say so, your Honor, is rather unique in this: The libelants regard the law of the case as being settled; and that arose in this fashion. The allegations of the Amended Libel were excepted to by the respondent as being insufficient to state a cause of action. Voluminous briefs were filed with Judge Bowen and the matter was argued

on two or more occasions at great length; and on May 31st, 1942, Judge Bowen filed a carefully prepared written opinion which in our view is the law of the case in so far as the war risk question is concerned. In our memorandum which I have just handed to your Honor we point that out. The Court will find the rather voluminous briefs where were filed on the question of the libel as to its sufficiency. When I refer to libel, I mean amended libel all the way through.

The libelants take the position that the law of the case having been established in Judge Bowen's opinion in this case, duly reported in the various reports, including the English Reports, our burden here is to prove the allegations of the libel, which, of course, Judge Bowen assumed as true in testing the sufficiency of the cause of action stated in the libel. We are prepared to do that.

Our proof will show, briefly, that the USS Roustabout was a Navy tanker duly commissioned as a Naval vessel, armed with appropriate armament, manned with official naval personnel, officers, and enlisted men and was engaged at the time here material in a [5] shuttle service between war bases in Seattle and war bases in the Territory of Alaska at which the war activity was very pronounced.

The function of the vessel was to carry in her tanks—she being a tanker vessel, petroleum products belonging to the United States Navy from naval stores and tanks at Seattle, a war base, to

war bases in the Territory of Alaska—Sitka, a large Naval Airfield; Juneau, Ketchikan, Port Al-phort, Port Alexander, and other places which the witnesses will name; all of which were active war bases in the prosecution of the war against Japan at that time.

The testimony will show that there was enemy action at or near these bases, both before the war and thereafter. It was the duty of this vessel in shuttle service to transport, as I say, petroleum products for the use of the Armed Forces—by that I mean the Navy—in Alaska, as well as munitions, bombs, and other war materials in her dry-cargo hold; in other words, this vessel was primarily a tanker but she did have a dry-cargo hold. I have forgotten the capacity—I think somewhere around 200 or 300 tons, or thereabouts.

In connection with her shuttle service she [6] would transport southbound—coming southbound to pick up another load of war munitions to again take to Alaska—she would then take southbound damaged airplane parts belonging to the Navy, torpedo cases, ammunition cases, empty drums which were being brought back for refilling with aviation gasoline. So that in this shuttle service she was serving the combatant forces of the United States Navy and Coast Guard in the transportation of petroleum products and munitions northbound and other Navy munitions southbound for either refilling or repair.

Having established with that evidence the charac-

ter of the vessel as a war vessel—and the testimony will show that she was a duly commissioned war vessel, the same as the Carrier Lexington or anything else. She was a duly commissioned vessel, used for the furtherance and prosecution of the war in the Territory of Alaska.

The only other issue, as we see it—and I may say that under Judge Bowen's opinion he did find the Roustabout to be a war vessel, and the claim was properly one under war risk policy. It is necessary, however, for us to prove that the collision itself occurred either by reason of the sole fault of the USS Roustabout or the mutual faults of both vessels. [7] Legally, in so far as the war risk problem is concerned, it makes no difference whether the collision occurred by reason of the sole fault of the Roustabout or the mutual fault of both vessels.

I believe in the case tried before your Honor, yesterday, the mutual fault was stipulated, so that the question was out. We shall undertake to prove it, however, in this case.

The proof, I may say, very briefly, will shape up in this fashion:

The site of the collision between these two vessels which occurred somewhere around 2:00 a.m. on May 11th, 1942, was in a body of water located in British Columbia known as Discovery Passage. It is a body of water bounded on the one side by Vancouver Island and the mainland and numerous islands on the other side; and it varies in width from three-quarters of a mile to a mile, and is what the Rules of the Road—we shall contend—characterize as a narrow channel.

The channel runs generally in a northerly and southerly direction. The Roustabout was proceeding southbound in a general southerly direction. The Eastern Prince was progressly toward Alaska in a generally northerly route. We shall contend that the [8] point of collision was on the left or east side of mid-channel, in so far as the Roustabout was concerned, and that she violated the Article in reference to the narrow channel rule by failing to keep on her right or starboard side of mid-channel. That may be likened somewhat to the driving of a car; you stay on your right side of the road, which obtains under the Narrow Channel Rule.

Secondly, we shall contend that the Roustabout was at fault in failing to sound the appropriate whistle signals, under the International Rules, upon alteration of her course after the vessels were in sight of each other. Both of those faults are what is known, your Honor, as so-called statutory faults.

We shall also contend that the Roustabout was at fault in failing to pass port to port as required by the rules.

Having established the character of the USS Roustabout as a war vessel within the meaning of the decision, and that either sole fault on the part of the Roustabout or mutual fault—it makes no difference in the ultimate determination of this case which the court may find—we will feel then that we shall be entitled to recover as prayed for in the libel.

The question of damages as alleged in the libel I believe will be covered by stipulation which we can report to your Honor later during the trial. I have no doubt that that factor or phase of the matter will

be agreed upon by counsel and stipulated into the record, thus avoiding the necesisty of proof. I believe that that generally covers the problem.

This case I may say, your Honor, is of particular interest in as much as it is virtually the only case or at least the first case to grow out of this very interesting war marine risk question in the past war, World War II. Judge Bowen's opinion has been published in the English Reports and is a matter of particular interest to the marine insurance fraternity.

We feel, as I previously indicated, that the decision of Judge Bowen is the law of the case. It hasn't been overruled by any other case. It hasn't been distinguished by any other case, to my knowledge.

Most of our law, as the Court will observe from the reading of the briefs, applicable to this question, arises in the English courts—the House of Lords and the lower courts of England. Mr. Justice Holmes, in a rather famous case, *Queen Insurance Company*, [10] says that there is good for the American courts following the English courts in this field of marine insurance. Judge Bowen also indicates that in his opinion and does follow the English decisions in deciding the legal questions here involved.

I think, your Honor, that briefly covers the subject. I hope it will shed some light on the general issue here.

The Court: Did you care to make an opening statement?

Mr. Henke: If your Honor please, the record in this case will show that the Roustabout is not a battleship, as counsel has attempted here to you, but is a small tanker which was originally known as the Hawaiian Standard. She was employed by the Standard Oil Company in the transportation of petroleum products between various islands of the Hawaiian group.

Some time approximately upon our entry into the war the vessel was requisitioned by the appropriate government agency and was converted to use as a tanker manned by a Navy crew and operating out of Seattle, Washington. Its duties were the routine ones of carrying various petroleum products to various [11] stations which existed in southeastern Alaska. The vessel carried no more armament than was carried by the ordinary Liberty or vessels of similar type which were operating in these waters. It was in effect a primarily merchant vessel but was operated by the Navy in carrying out the general program of the Navy.

The record will show that the vessel was commanded, as a matter of fact, by a very competent captain who had spent the greater part of his life navigating the southeastern Alaska waters. His status was not very much different than that of the ship he commanded. He had commanded various other vessels which were operated by the Alaska Transportation Company from Seattle to these same ports in southeastern Alaska. When the war came, he put on a Navy uniform where previously he had

worn the civilian uniform of the Alaska Transportation Company, and proceeded to navigate in the same waters.

The record will further show that at the time that this accident occurred there was no blackout, no restrictions of any kind so far as navigation was concerned. The shore navigating aids were all functioning all along the Coast in the same manner as before the war. The vessels carried all of their lights. As a matter of fact, the record will show that one of the issues in the case, so far as negligence is concerned, is that the Eastern Prince had too many lights on her—not only enough lights but more than she should have had.

The circumstances are very simple, so far as the setting is concerned. You will probably, before deciding this case, read various of the war risk cases and practically all of them of course involve some phase of actual war operations, in the sense that there is some war risk involved; that the vessels are operating under circumstances without lights, under convoys, under direction of naval officers, or the naval vessel is engaged in some naval maneuver or operation.

In this case I think your Honor will be impressed with the fact that the circumstances are such as would occur in an ordinary marine accident which would occur out in the same waters today. The same accident could occur on the same waters today without the slightest difference. The circumstances would be entirely the same.

Referring to the law of the case, Counsel has referred to Judge Bowen's decision. Of course, Judge Bowen's decision was upon what was in effect [13] our demurrer to their libel. As Counsel states, it was argued at considerable length and the Court, after considerable consideration, finally concluded in his decision that the libel, as recited, stated a cause of action. But, of course, the fact that the court decided that their libel stated a cause of action and permitted them to come into court does not mean that the law is decided or that the facts are decided as Counsel's statement would imply. It is our opinion that Judge Bowen's decision did nothing more than to decide that in his opinion the libel which they had filed was sufficient to keep them in court. He did not decide that they had a case or that they were entitled to recover and I am sure he would be the last one in the world to make such a suggestion. We consequently will desire to present the law to you in complete detail.

As Counsel has suggested, it is the rule of the cases which are recited in these various briefs that when there is a collision between what is designated as a warship and a merchant vessel, the accident will be considered as a war risk loss if the accident is the result of the action of the warship—the negligent operation of the warship or in effect the accident is contributed to by the [14] negligent operation of the warship. We do not concede in this case that there was any negligence on the part of the warship or that anything which it did contrib-

uted to the accident as such; and we do not further concede in this case in the slightest that the vessel involved, the Roustabout, was to be classified as a warship or classified as engaged in a war activity at the time of her collision.

The record will show, as a matter of fact, that the Roustabout had at the time of the collision delivered a cargo of various types of petroleum products to Sitka, Alaska, which is in southeastern Alaska; and had merely gone up there, pumped her petroleum products out, and delivered those few items of dry cargo which she carried, probably taken on a few empty oil drums and taken on water for ballast and was returning to Seattle in that condition. In other words, you will find that she had on board only the water ballast to keep her floating properly in the water and little dry cargo in the way of empty drums and that was the entire cargo of the vessel returning to Seattle.

In other words, at that time she had no war supplies of any kind on board which would be a serious factor. She was doing in effect the type of work which any other vessel doing work of that type would be engaged in.

So that is our view that the Roustabout is not a warship—was never a warship; that under the circumstances of the accident the conditions were such that they should never be construed as circumstances creating a liability under a war risk policy.

I am sure that your Honor, when you have heard the facts of the case, will concur that the cir-

cumstances are not such as to suggest the possibility of war risk in the sense of there being anything which the war in effect was a factor toward contributing to the loss of the *Eastern Prince* and that this is properly a loss which would fall upon the marine underwriters rather than on the war risk underwriters.

Mr. Long: Mr. Henke, it is my understanding that you are prepared to admit the allegations of paragraph I of the Amended Libel with reference to the ownership of the vessel and so forth?

You might examine that.

Mr. Henke: I was just trying to find my copy of the Amended Libel. Just one second.

Yes, we are willing to stipulate that Henry O. Link is the owner of the *Eastern Prince*; that E. W. Elliott was at the time the bareboat charterer; and [16] that the loss payable clause of the policy recited that the payment be made to O. L. Grimes, which is the allegation of your Paragraph 1.

Mr. Long: Very good.

Mr. Henke, are you also prepared to stipulate that no other person has any interest in this recovery except those named as the parties libelant?

Mr. Henke: Why is that allegation material to your case?

Mr. Long: The reason for it is that technically the United States of America is named as a charterer. It isn't, as a matter of fact. I can assure you at least that the United States has no interest

in this recovery,—only those persons named as libelants.

Mr. Henke: Yes; for that purpose we will so stipulate.

Mr. Long: The libelants, Link, Elliott and Grimes, are the only persons having any interests of recovery in this case.

Mr. Henke: That is right.

Mr. Long: I would like marked as Libelants' Exhibit 1 the document which is the policy here sued upon.

(Insurance policy marked Libelants' Exhibit 1 for identification.) [17]

Mr. Long: Mr. Henke, I wish you would examine Libelants' Exhibit 1. I think we can stipulate that it may be admitted in evidence as the policy.

The Court: There was an admission made—as to paragraph 1.

Mr. Long: Yes. The allegations of paragraph 1 are admitted without proof.

Mr. Henke: Yes, sir. We will stipulate that this is the policy of the respondent company which was duly issued.

Mr. Long: I will offer it in evidence, your Honor, with the stipulation.

Mr. Henke: No objection.

The Court: It will be admitted as Libelants' Exhibit Number 1.

(Libelants' Exhibit 1 received in evidence.)

Mr. Long: I will call Mr. Jones. [18]

WINSTON J. JONES

called as a witness by and on behalf of libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Long:

Q. Would you state your full name to the Court, Mr. Jones? A. Winston J. Jones.

Q. Where do you reside, sir?

A. Seattle, Washington.

Q. You have for how long, approximately?

A. Forty-five years.

Q. What is your present business, Mr. Jones?

A. I am District Manager of the State Steamship Company.

Q. Prior to the war, were you engaged in any steamship activity?

A. I was manager of the Alaska Transportation Company.

Q. During the past World War II, in which if any branch of the Armed Services of this country did you serve?

A. I was called on duty in October, 1941, and served in the Port Directors Office, Seattle.

Q. That is the United States Navy?

A. Correct.

Q. Prior to your being called to duty, I assume you were [19] a Reserve Officer in the Navy?

A. That is correct.

(Testimony of Winston J. Jones.)

Q. What was your rank, Mr. Jones, when you entered the active Naval Service during this last war?

A. I was a Lieutenant.

Q. Lieutenant Junior or Senior grade?

A. Senior grade.

Q. And you entered the Service in 1941?

A. October of 1941.

Q. What were your duties as an officer of the United States Navy during the spring of 1942 and particularly during the month of May, 1942?

A. I was Executive Officer to Captain Charles Karrick, the Chief of Staff for Operations and Port Director of the 13th Naval District.

Q. What were your duties in that capacity, Mr Jones?

A. They were multitudinous; they included supervising the operations of all auxiliaries and those auxiliary transportation services and auxiliaries assigned to the 13th District, the Naval Transport and certain other transportation from Chicago.

Q. What area did the 13th Naval District include in May, 1942?

A. In May, 1942, it included the entire Territory of Alaska. [20]

Q. Also the State of Washington?

A. Washington, Oregon, and down as far as below Coos Bay, Oregon, is the line of demarcation.

Q. Do I understand it included all of the Territory of Alaska?

A. That is correct, at that time.

(Testimony of Winston J. Jones.)

Q. Were you in May, 1942, acquainted with the vessel known as the USS Roustabout?

A. Yes, I was.

Q. What if any duties did you have in connection with the operation of the Roustabout in May, 1942?

A. Under my direction all orders were given the ship concerning her loading and her orders for completion of discharge and delivery of supplies to the bases.

Q. By whom was the USS Roustabout owned and operated in May, 1942?

A. She was a commissioned vessel in the United States Navy.

Q. By a commissioned vessel what do you mean?

A. She has the same status as any ship in the Navy.

Q. The same status, for example, as a battleship or a carrier, either?

A. That is correct; combat ship or auxiliary.

Q. Do you remember approximately when the USS Roustabout was acquired and commissioned by the Navy? [21]

A. I don't recall the exact time. I recall that she was operating in the Alaska trade—that is, operating between Seattle and Alaska at the time I was called on duty.

Q. And as a commissioned vessel at that time of the Navy? A. That is correct.

Q. Would you just briefly describe the Roustabout,—what type of vessel she was?

(Testimony of Winston J. Jones.)

A. She was termed a navy oiler. In the commercial trade that is a tanker. She had a capacity of roughly 10,000 measurement barrels, with dry cargo space as is customary in most tankers.

Q. In May, 1942, how was the Roustabout manned and with whom?

A. She was manned by commissioned officers and enlisted men of the Navy.

Q. Were there any civilian employees on her as either officers or crew? A. No.

Q. Are you acquainted with the name of her Master or Commanding Officers in May, 1942?

A. Yes. It was Larry Parks.

Q. In May, 1942, Mr. Jones, was the USS Roustabout armed in any way? [22]

A. She had armament aboard.

Q. In general, what type of armament was it?

A. I don't recall. She had a stern gun and the usual guns forward but I don't recall the armament that she had.

Q. During about that period had you ever been aboard her personally? A. Yes.

Q. As part of your duty? A. Yes.

Q. Mr. Jones, would you describe to the Court what the duties of the USS Roustabout were in May, 1942, or before or after or along in that period?

A. Well, the Roustabout was used as a shuttle ship between Seattle and the main naval base,—in southeastern Alaska, which was at Sitka. In addition she served the Coast Guard Base at Ketchikan.

(Testimony of Winston J. Jones.)

She served the outlying naval auxiliary base at Port Arthorp and Tamgas Harbor on Annette Island. And on occasion she had occasion to call at a small base we had at Petersburg.

Q. Did she at that time carry any commercial cargo? A. No.

Q. Was she operated as a merchant vessel at that time, in May, 1942? [23] A. No.

Q. In May, 1942, Mr. Jones, I will ask you whether or not there were any naval war bases in the City of Seattle?

A. The naval base at Seattle served the entire Alaska-Aleutian area.

Q. I gather it was a base of supply here in Seattle? A. That is correct.

Q. Where did the USS Roustabout lift her cargo—which I understand was through the orders of your office—at Seattle?

A. Well, we had tanks at the naval base which is commonly known in Seattle as Pier 91. In addition we had a large oil storage area in Manchester. She would pick up part of her cargo at the naval base and the balance at Manchester, or she might pick it all up at Manchester or all up at the naval base, other than the dry cargo which we put aboard at the naval base.

Q. In reference to the dry cargo, what was the character of the dry cargo that the Roustabout carried during May, 1942?

A. Oh, she would carry bombs, ammunition, and

(Testimony of Winston J. Jones.)

drums of petroleum products, torpedoes,—any munitions of war.

Q. Was all of that cargo owned by the United States Navy, [24] property of the Navy?

A. Yes, it was.

Q. To what points in Alaska did she carry that cargo?

A. To the Section Bases,—or to the Air Facilities that I mentioned a moment ago; to Tamgas Harbor on Annette Island, Ketchikan, which is the Coast Guard Base; Sitka, which was our largest base in that area, and the outlying bases of Port Althorp, Port Alexander.

Q. What can you say, Mr. Jones, as to the activity of those war bases in Alaska during May, 1942?

A. Well, the naval auxiliary air services were used as a base for patrols primarily. The exact details of the operations I am not too conversant with.

Q. My question went to this: Were they active war bases during that period?

A. They were.

Mr. Henke: Counsel got his question in a little faster than I anticipated. Your Honor, I move to strike that question and answer as leading and calling for a conclusion of the witness as to the nature of the operation. I have no objection to his describing the operation if he knows but I don't think he should arbitrarily be permitted to describe the war bases.

(Testimony of Winston J. Jones.)

The Court: I will strike the answer. [25]

Mr. Long: I will restate the question.

Q. (By Mr. Long): Do you know, in the course of your duties in the Navy in May, 1942, as you have described, whether or not the bases at Sitka and other ports which were served by the Roustabout were or were not active war bases in May, 1942?

Mr. Henke: I object to the question. I think it calls for a conclusion. I think he should state whether he knows what the activities were.

The Court: The objection is overruled. He can answer the question yes or no.

Mr. Long: I am asking him whether or not he knows there was war activity at those bases.

A. Not from contact but from knowledge of their operations.

Mr. Long: I think I can cover that by another witness, Your Honor.

Q. (By Mr. Long): Mr. Jones, in the course of your duties in your official capacity with the Navy, did you learn as to the activity of those bases?

A. Not in detail.

Q. You mentioned, Mr. Jones, that in May of '42, the time here material, the Roustabout was in a shuttle [26] service between Seattle naval bases and naval bases in Alaska?

Mr. Henke: I object to that testimony because I don't recall the testimony of this witness that she was engaged in shuttle service.

(Testimony of Winston J. Jones.)

The Court: There is something in the testimony—at least embodied in the question of counsel, as to which there was no objection.

Mr. Long: I think Your Honor I asked the witness what service she was in and the witness said she was in shuttle service between war bases in Alaska and the Territory, is that correct?

The Witness: That is correct.

Mr. Long: I didn't suggest it. I asked the question and the witness answered it.

The Court: The objection is overruled.

Q. (By Mr. Long): Will you describe what you mean by shuttle service a little more in detail, Mr. Jones?

A. Well, it was common during the war period to utilize vessels to their best advantage. A ship might be ordered to the Alaska sector on one voyage, return and be ordered to the Hawaiian sector on another. But the Roustabout maintained its regular run between Seattle and southeastern Alaska.

Q. Did she have duties as a naval vessel both northbound and southbound in that service; did she have duties to perform, both northbound and southbound in that shuttle service?

A. Well, northbound she would obviously carry her petroleum products; southbound she would bring returned cargoes of all descriptions.

Q. Could you name a few types of returned cargoes?

(Testimony of Winston J. Jones.)

A. Oh; defective ammunition and empty drums, empty torpedo cases.

Q. I can't ask a leading question. It may sound a little ridiculous, Mr. Jones, but what was her purpose of returning to Seattle in this service?

A. In order to reload.

Q. For what purpose?

A. For the same bases.

Q. By whom, Mr. Jones, was her cargo used in Alaska; that is to say, the cargo which she carried to Alaska, who used?

A. The Naval Forces Afloat, Ashore, and in the Air.

Q. Who used or made use of the cargo she carried southbound?

A. They were confined to the Navy,—various naval activities. If it were defective ammunition, it would be delivered to Ordnance. If it were airplane [28] parts, they would be delivered to Naval Air, and of course, the empty—

Q. What about the empty gasoline or oil drums she carried outbound, what were they used for?

A. They would be returned for refilling.

Q. What use would be made of them after they were refilled?

A. They would be returned to the north, presumably; whether the exact drum would be returned or not, I don't know.

Q. At the time of the collision on May 11th, 1942, I will ask you whether or not the USS Roust-

(Testimony of Winston J. Jones.)

about was on active naval duty under your officers' jurisdiction?

Mr. Henke: I think that calls for a conclusion. He can tell what the vessel was doing. He has already done that.

Mr. Long: I think I am entitled to ask of this witness if she was on active naval duty.

The Court: The objection is overruled.

Mr. Long: Will you answer the question.

A. Yes, she was on active naval duty.

Q. (By Mr. Long): Was she duly commissioned as a naval vessel at that time?

A. Yes, she was.

Mr. Long: I think you may examine, Mr. Henke.

Cross Examination

By Mr. Henke:

Q. Mr. Jones, when we use the term that the vessel is a commissioned vessel in the Navy, we mean merely that she has been taken as a part of the naval establishment and is manned by a naval crew, is that not correct?

A. A commissioned vessel of the United States Navy is a ship of the Navy, regardless of what her past history was or what her category was.

Q. Yes. But my question is that when we use the term "a commissioned vessel of the United States Navy," we actually mean that she is manned by a naval crew and a specific part of the naval establishment?

A. And has been brought up to Navy standards.

Q. The vessel wouldn't necessarily have to be

(Testimony of Winston J. Jones.)

brought up to Navy standards to be commissioned?

A. That is correct.

Q. Thus we say that a naval vessel is commissioned when we remove the Navy crew from her and put her in storage; she still belongs to the Navy, is that right?

A. That is correct.

Q. So that actually the term "commission" means primarily that she is manned by a Navy crew. And correspondingly, [30] a tug which operates here out in the harbor, which is a part of the Navy establishment and is manned by a Navy crew, is a commissioned vessel of the Navy?

A. Not necessarily. A tug might be just called in service. There are different categories on that.

Q. How about aircraft rescue vessels?

A. An aircraft rescue vessel? You will have to describe the type.

Q. Yes; I will be glad to describe several types. There is the type which has in effect a powered scow with a derrick on board for aircraft rescue.

A. Do you mean what we term a "Mary Ann"?

Q. I think that possibly is correct.

A. That would not be a Navy vessel.

Q. How about a net tender?

A. The larger net tenders would be commissioned vessels.

Q. How about what is known as a "Mickey Mickey Tug"—one of the larger type tugs?

A. That is an Army type of tug, not Navy.

Q. Well, the Navy has the same type, don't they?

A. Not exactly, no; I wish they had.

(Testimony of Winston J. Jones.)

Q. Considering a Navy tug comparable to that, that would be a Navy vessel, would it not?

A. That is correct. [31]

Q. So that when we consider the question of whether or not a vessel is commissioned, we mean merely that it is part of the naval establishment and has a Navy crew aboard? A. Yes, sir.

Q. Now, referring to the Roustabout and her cargo facilities, as I understand that she did have one hold which was designed for the carriage of dry cargo as is common in tankers of that type?

A. That is correct.

Q. She was primarily, however, designed for the purpose of carrying petroleum products in bulk?

A. That is correct.

Q. And her voyages north, the dry cargo which was aboard consisted to a very large extent of Ships Service Stores, did it not? A. No.

Q. Ships Service Stores were a substantial part of her dry cargo, were they not? A. No.

Q. Have you consulted the records?

A. I recall at that time that we were in dire need of transportation and we used the dry cargo space of the Roustabout for bombs and other munitions which were direly needed in the north. Obviously, if I [32] may say—obviously, there were Ships Stores aboard but not in the proportion which you indicate.

Q. Upon her return from these northern ports, she would return in ballast, would she not; that is, she would carry sufficient water to make her navi-

(Testimony of Winston J. Jones.)

gate properly? A. Yes, sir.

Q. And the only other cargo which she would have aboard would be the empty oil drums and miscellaneous things of that type which she might casually pick up at the various points at which she stopped?

A. Anything that they desired to send down that she could carry.

Q. Anything that was handy, they would put aboard her to make use of the return voyage?

A. That is correct.

Q. But primarily she was coming back in ballast, so to speak? A. That is correct.

Q. Actually, her principal port of call in Alaska was Sitka, was it not? A. Yes.

Q. And she would—as any other tanker would—pump her tanks dry into tanks on shore and then she would return to Seattle?

A. At times she was used by the Commander of the Sector [33] to serve outlying points in the south-eastern Alaska area, the points being the facilities I mentioned a little while ago.

Q. The Coast Guard base at Ketchikan and points of that nature? A. That is correct.

Mr. Henke: I think that is all. Thank you.

Redirect Examination

By Mr. Long:

Q. I think you said, Mr. Jones, that the dry cargo hold was employed at that time for bombs and ammunition because they were direly needed?

A. That is correct.

(Testimony of Winston J. Jones.)

Q. Would you amplify that statement a little bit, please; badly needed where and why?

A. Badly needed by the Alaska and Sitka Sector.

Q. What were these ammunition and bombs needed for?

A. A great any aerial bombs were sent north for the patrol planes,—torpedoes and various and sundry other munitions.

Q. Counsel's examination of you, Mr. Jones, with reference to the cargo she picked up southbound, indicated she would just pick it up when it was handy; what was the fact about that? Was she dispatched south with [34] definite cargo?

A. She was dispatched southbound with all they could get aboard.

Mr. Long: I think that is all.

Recross Examination

By Mr. Henke:

Q. When you say she was dispatched southbound with all they could get aboard,—how much dry cargo was she capable of carrying; what was her cubic area for dry cargo?

A. As I recall, it was approximately 250 tons.

Q. That is a relatively small capacity, is it not?

A. It is not a great amount.

Q. As she was a carrier of petroleum, the logical thing for her to carry upon her return to the United States would be empty oil drums, would it not?

A. Not entirely. At that time space was so much

(Testimony of Winston J. Jones.)

at a premium, as I mentioned a short time ago, she was extremely valuable to us.

Q. Was space at a premium southbound from Alaska?

A. Space was at a premium all bounds.

Q. That interests me, Mr. Jones. What products were they shipping south from Alaska at that time; I thought the movement was the other direction. [35]

A. That is correct. For some unknown reason there is a tremendous amount of defective ammunition always moving the other way from an advance area.

Further Redirect Examination

By Mr. Long:

Q. Defective ammunition, you say?

A. Yes. The point that you are bringing out is that there were many ships going north and that they were coming back in ballast. The point is that she was making these points that were not served by regular service.

Q. That is a situation peculiar to herself, that she was serving these various stations there and it was convenient for you to use her on returns?

A. That is correct.

Mr. Long: I think that is all, Mr. Jones, unless your Honor has any questions.

I didn't ask one other question which I think I should in justice to you, Mr. Jones.

Q. (By Mr. Long): What rank were you in the Navy at the time of your discharge?

(Testimony of Winston J. Jones.)

A. Commander.

Mr. Long: May the witness be excused?

(Witness excused.) [36]

(Short recess.)

The Court: Are we ready to proceed, gentlemen?

Mr. Long: I should like to call as the next witness, your Honor, Captain Lawrence A. Parks.

LAWRENCE A. PARKS,

called as a witness by and on behalf of the libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Long:

Q. You were subpoenaed to be here, Captain Parks, today? A. That is right, sir.

Q. Would you state your full name?

A. Lawrence A. Parks.

Q. Where do you reside?

A. Seattle, Washington.

Q. What is your present occupation, Captain Parks? A. I am a Ships Master.

Q. What vessel? A. Grommet Reefer.

Q. For what company?

A. Alaska Transportation Company [37]

Q. What if any licenses do you hold issued by or through the United States Department of Commerce or the Coast Guard?

(Testimony of Lawrence A. Parks.)

A. Master of Steamer Vessels of any gross tonnage, any ocean.

Q. That is commonly referred to as a Master's License Unlimited. A. That is right, sir.

Q. What other licenses do you hold?

A. Pilot's License for Southeastern and Southwestern Alaska.

Q. Approximately how long, Captain, have you held those licenses?

A. The Unlimited License I had in 1941.

Q. That is the Master's Unlimited?

A. Yes, sir.

Q. And your pilot's licenses were issued at about what time, Captain? A. 1925.

Q. How many years, Captain, have you been going to sea approximately in all capacities?

A. I started in 1914, though there was a break of three or four years in there that I wasn't on the sea.

Q. You came up through the ordinary, usual grades of ordinary seaman and able seaman? [38]

A. Yes, sir.

Q. Third Officer, Second Officer, Master, and the Pilot's License?

A. I skipped Third Officer.

Q. During and prior to the outbreak of World War II, were you in the United States Naval Reserve? A. Yes, sir.

Q. Were you called to service, active duty?

A. Yes, sir.

Q. About what date, Captain?

(Testimony of Lawrence A. Parks.)

A. I went on active duty on the 12th of May, 1941.

Q. Where was that active duty served when you first were activated?

A. I reported for duty here at the 13th Naval District in Seattle.

Q. You became Master of the Steamer USS Roustabout, did you not? A. Yes, sir.

Q. Were you her Commanding Officer on May 11th, 1942? A. Yes, sir.

Q. Prior to taking over command of the USS Roustabout, what in general was the nature of your naval duty and where?

A. For six months prior to taking command of the Roustabout, I was Commanding Officer of the Section Base at Sitka, [39] Alaska.

Q. What type of base was that, so that we may understand a little better, Captain?

A. Well, a Section Base was established in connection with the Naval Air Station. The Commanding Officer of the Section Base and the men on the Section Base operated the boats, service crafts, patrol boats, had charge of the docks—had charge of all service activities.

Q. At that base or from that base?

A. From that base, yes, sir.

Q. You say there was a naval air station at Sitka? A. Yes, sir.

Q. Was that a large or a small station?

A. It was under construction then to be a large station.

(Testimony of Lawrence A. Parks.)

Q. Approximately when was it completed for use?

A. Well, it was being used from 1941, or from 1940 I believe on until—I believe in 1944, and the station at that time was beginning—it never was completed—it was beginning to go back down hill again. The need for it seemed to be less.

Q. Was that because the activity had moved more to the westward? A. Yes, sir.

Q. Westward Alaska? [40] A. Yes.

Q. Captain, what, if anything, did you do while stationed at that Sitka Section Base, toward establishing any other naval bases in that general vicinity of southeastern Alaska?

A. The Commanding Officer at the Naval Air Station at Sitka, I was on his staff for the establishment of the other bases in southeastern Alaska.

Q. What were those other bases?

A. Port Althorp and Port Armstrong.

Q. What was your rank as an officer at that time, Captain? A. Lieutenant.

Q. Senior grade?

A. Senior grade; yes, sir.

Q. Approximately when did you become Commanding Officer of the USS Roustabout?

A. March 30th, 1942.

Q. And remained as her Commanding Officer until approximately what date?

A. April of '44.

Q. Captain Parks, would you please describe the character of the USS Roustabout, so that the

(Testimony of Lawrence A. Parks.)

Court may understand what her size and dimensions and her characteristics were?

A. She was a small tanker, carrying bulk petroleum products, [41] and also had a dry cargo hold aft with a capacity of in the neighborhood of 250 cubic—

Q. Measurement tons?

A. Measurement tons.

Q. About what was her over-all length, approximately? A. 221 feet, I believe.

Q. What breadth; what was her beam?

A. 39 feet.

Q. At the time you took command of her as her Commanding Officer, what was her status, if any, in the United States Navy?

A. She was a commissioned vessel in the United States Navy.

Q. How was she manned?

A. Navy; an all-Navy crew.

Q. Were the officers naval officers?

A. Yes, sir.

Q. What were her unlicensed personnel?

A. Naval enlisted men.

Q. Were any civilian employees a portion or part of her crew? A. No, sir.

Q. Did that same situation as to her manning by naval officers and crew obtain at the time of this collision we have before us, May 11th, 1942? [42]

A. Yes, sir.

Q. Was she on May 11th, 1942, a commissioned naval vessel? A. Yes, sir.

(Testimony of Lawrence A. Parks.)

Q. During May, 1942, what if any armament did the USS Roustabout have?

A. She had a 3-inch, 50-caliber gun on the stern; two 50-caliber machine guns on the bridge, and two 20-milliammeter guns forward.

Q. Did she have ammunition with which to serve those guns on board in May of '42?

A. Yes, sir.

Q. Did she have a crew who could operate and fire the guns? A. Yes, sir.

Q. What was the purpose of that armament?

A. For our protection.

Q. Protection against whom? We have to have it in the record. I know and the Court knows, but we have to have it in the record, Captain.

A. Well, the thought was the Japanese subs might get over in our neighborhood, there.

Q. Were any reported in your neighborhood?

A. Yes, sir.

Q. Were any sunk in your neighborhood—Japanese [43] submarines sunk?

A. One, I believe.

Q. Was that armament capable of being used for offensive purposes? A. Yes, sir.

Q. Against small craft? A. Yes, sir.

Q. And aircraft? A. Yes, sir.

Q. During your service on the Roustabout, Captain Parks, in what service for the United States Navy was she engaged; will you describe the nature of her service?

A. Well, the primary duty was carrying bulk

(Testimony of Lawrence A. Parks.)

petroleum products to Southeastern Alaska.

Q. For whom and for whose use?

A. The United States Navy.

Q. Where did you load that type of cargo on the USS Roustabout, say in May of that period, 1942?

A. The Seattle Naval Station.

Q. Where is that located here in the harbor?

A. Pier 91.

Q. What type of cargo, if you recall, was it that you did load; what type of oil?

A. Well, I don't know that particular trip. We carried [44] four different types of oil but we wouldn't always have that four types every trip. We carried heavy steaming oil, black oil, Diesel oil, motor gasoline, and aviation gasoline.

Q. Did you carry any petroleum products in drums—or barrels, as we might call them?

A. Yes.

Q. What type product was carried in that fashion?

A. That was lubricating oil.

Q. Did you load the cargo at any other place other than the naval base at Pier 91 in Seattle, in this service?

A. 90 and 91. We used to get our dry cargo at 90.

Q. What type of dry cargo did you carry north-bound?

A. The cargo we got at 90 would be mostly ships service stores.

Q. What other type of dry cargo did you carry?

A. Bombs and ammunition.

(Testimony of Lawrence A. Parks.)

Q. Where would you load that?

A. Up at Indian Island, Ordnance Depot.

Q. For the Court's information, where is Indian Island?

A. It is up just south of Port Townsend in the harbor, there.

Q. In Puget Sound?

A. In Puget Sound, yes.

Q. Approximately how far from Seattle? [45]

A. Forty miles.

A. What was Indian Island at that time?

A. A Naval Ammunition Depot.

Q. On your northbound trip with the petroleum products and dry cargoes which you have described, where was that dry cargo carried, and the petroleum products carried?

A. Our main port of discharge was Sitka. We also discharged at—if we had a cargo for Ketchikan, then we discharged that northbound for Sitka.

Q. For whose use was the petroleum product and the bombs and ammunition and other things that you carried; who used it?

A. Most of it was the Navy and Coast Guard. Occasionally, we would carry some fuel for the Army.

Q. For what purpose was it used?

A. Well, for the maintenance of the bases and the carrying on of the war effort.

Q. Was it used in combat craft, both surface and air? A. I can only assume that.

Q. I will ask you: are you familiar with the

(Testimony of Lawrence A. Parks.)

activity of the war bases which your vessels served during May of '42? A. Yes, sir.

Q. I will ask you whether or not there was any war activity [46] at those bases and from those bases? A. Yes, sir.

Q. And did the products which you carried—petroleum and dry cargo, ammunition and so forth—go to those war bases for their use?

A. Yes, sir.

Q. You have mentioned the war base at Sitka. What other war bases did the Roustabout serve?

A. The Coast Guard bases at Ketchikan.

Q. What others? A. Port Armstrong.

Q. Was that an active base? A. Yes.

Q. Any other? A. Port Althorp.

Q. Was that also an active base?

A. Yes, sir.

Q. What kind of activity was being carried on from Sitka, Port Althorp and those other bases you have mentioned?

A. They operated both surface and airplane patrols off the Coast.

Q. What is the function of surface and air patrol and was the function at that time in May '42?

A. To watch for any enemy vessels and convoying our own [47] vessels.

Q. Would you state whether or not during that time there was any reported enemy activity in that general region? A. Yes, sir; there was.

Q. What was the duty of the USS Roustabout on her southbound voyage, after delivering her pe-

(Testimony of Lawrence A. Parks.)

troileum products to the bases you have indicated and her dry cargo to the bases you have indicated; what was her duty on her southbound voyage?

A. Why, we would take any freight offered by the Navy or Coast Guard that we were able to handle and take it to Seattle.

Q. What was the character of that cargo southbound? A. It was very varied.

Q. Would you just give us an idea, please?

A. Oh, empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks, automobiles.

Q. By whom was that cargo owned that you brought southbound? A. United States Navy.

Q. Did you carry any commercial cargo for hire either northbound or southbound on the USS Roustabout? A. No, sir. [48]

Q. Was the vessel employed as a Merchant vessel in May, 1942, either northbound or southbound?

A. No, sir.

Q. You have mentioned some of the southbound cargo. I will ask you whether or not you carried southbound from time to time defective ammunition,—torpedo cases? A. Torpedo cases.

Q. I beg your pardon? A. Yes, sir.

Q. Your vessel being principally a tank vessel, Captain, was there any petroleum products to be returned from Alaska to Seattle? A. No, sir.

Q. So you came down, of course, light except for the various materials that you have mentioned of the Navy?

(Testimony of Lawrence A. Parks.)

A. We had ballast in our tanks to give us the draft we desired.

Q. So that your vessel would be in proper trim and proper maneuverability?

A. That is right.

Q. What was your purpose in returning to Seattle? A. To load up and go north again.

Q. Was that your purpose in returning to Seattle on May [49] 11, 1942, at the time of the collision? A. Yes, sir.

Q. When you speak of "load up," you mean load up with what?

A. With a full load of bulk oil,—all we could carry—and whatever else the Navy decided to ship with us that we could handle in the way of dry cargo.

Q. Is it correct to say, Captain Parks, that your vessel was engaged in May, 1942, in what might be described as a shuttle service between the war bases here and the war bases in Alaska that you have described? A. Yes, sir.

Q. Did the Roustabout go any place else other than Alaska waters or through British Columbia waters? A. No; that is all.

Q. Was your vessel ever called upon to do any convoy duty to protect a merchant vessel from possible enemy attack? A. No, sir.

Q. Do you recall of one occasion of when it was?

A. No, sir.

Mr. Henke: I object to Counsel cross-examining his own witness.

(Testimony of Lawrence A. Parks.)

Mr. Long: I want to refresh his recollection. He told me about it yesterday. [50]

Q. (By Mr. Long): Do you recall the fishing vessel *La Mercede*? A. No, sir.

Mr. Long: Possibly that was after you had left here. If so, I stand corrected.

Q. (By Mr. Long): Captain Parks, approximately what time on May 11th, 1942, did the collision take place between your vessel and the *Eastern Prince*, if you recall?

A. I don't recall the exact time. It was some time after midnight, I believe.

Q. In what body of water did that collision take place?

A. Discovery Passage, British Columbia.

Q. British Columbia waters? A. Yes, sir.

Q. Approximately how many times would you say you had navigated that body of water prior to this collision, either north or southbound?

A. Oh, a thousand times.

Q. Are you acquainted with Discovery Passage from its northernmost and southernmost end?

A. Yes, sir.

Q. In general, how does it lie as to north and south or east and west?

A. It runs in a northerly and southerly direction. [51]

Q. At the time and prior to the collision with the *Eastern Prince* on May 11, 1942, was your vessel northbound or southbound?

A. Southbound.

(Testimony of Lawrence A. Parks.)

Q. What was the state of the weather as to visibility at that time?

A. The visibility was good.

Q. What rules governed the navigation of vessels in Discovery Passage at the time of this collision, the International Rules or the Inland Rules?

A. The International Rules.

Q. Are you, Captain Parks, familiar with International Rule 25 having to do with Narrow Channels?

A. Yes, sir.

Q. I will ask you whether or not you regard Discovery Passage and that portion at the site of the collision between the two vessels as a narrow passage within the meaning of International Rule 25?

A. Yes, under those rules I guess it would be considered a narrow channel.

Q. You say it would be considered a narrow channel under Article 25 of the International Rules?

A. Yes, sir.

Mr. Long: I might say that 33 USCA Section 110 is the Article 25 of the International Rules. [52]

Q. (By Mr. Long): I will ask you, Captain Parks, at the time of and immediately prior to the collision was your vessel to the easterly side of mid-channel of Discovery Passage,—in other words, to your port?

A. Yes, sir.

Q. And by port you mean to your left side?

A. That is right.

Q. Of mid-channel, of course,—to the left side

(Testimony of Lawrence A. Parks.)

of mid-channel, looking over your bow, is that correct? A. That is right.

Q. Prior to the collision did you observe the lights of the Eastern Prince? A. Yes, sir.

Q. After observing the lights of the Eastern Prince and prior to the collision, was the course of the USS Roustabout altered? A. Yes, sir.

Q. Were any signals sounded in accordance with United States International Rule 28 upon the changing of that course? A. No, sir.

Q. I mean sounded by the Roustabout?

A. No, sir.

Q. At the time of the collision with the Eastern Prince, [53] was the Roustabout on active naval duty? A. Yes, sir.

Q. Was she at that time a duly commissioned naval vessel? A. Yes, sir.

Q. On May 11th, 1942, at the time of the collision, was the Roustabout carrying any commercial cargo for hire? A. No, sir.

Q. Was she at that time engaged as a merchant vessel in any respect? A. No, sir.

Mr. Long: I think you may examine, Mr. Henke. I have one other question.

Q. (By Mr. Long): Captain Parks, you have stated that at the time of and prior to the collision your vessel, proceeding southerly, was on the port or left-hand side of mid-channel. I will ask you whether or not it was safe and practical to be on the right-hand side or starboard side of mid-channel, had you so desired?

(Testimony of Lawrence A. Parks.)

A. It was not practical as the starboard side of the channel is shoal.

Q. Was it safe; did you have enough water? [54]

A. Providing I didn't get too far over; yes, sir.

Q. Isn't there, as a matter of fact, ample water and ample space on the starboard side of the mid-line of that channel to avoid a collision?

A. Yes; there is.

Q. In other words, you could have with safety to your vessel stayed on your right side of the channel,—of the midline of the channel?

A. Yes, sir.

Mr. Long: That is all.

Cross Examination

By Mr. Henke:

Q. Captain Parks, at the time the accident occurred involving the Roustabout and the Eastern Prince, there were no restrictions on any navigation aids in the Alaskan area,—southeastern Alaska area where you were navigating, were there; that is, all lights were showing that normally would show in peacetime? A. Yes.

Q. All of the vessels which were operating in that territory showed their usual running and navigating lights in the customary manner as in peacetimes, did they not? A. Yes, sir. [55]

Q. Prior to your entry into the Navy, you had been a Ship's Master for the Alaska Transportation Company, had you not? A. Yes, sir.

Q. And as such you operated various other vessels through these same waters at other times?

(Testimony of Lawrence A. Parks.)

A. Yes, sir.

Q. How long previous to this accident had you been navigating in these same waters?

A. Off and on for twenty-eight years.

Q. So far as conditions for navigating were concerned, at the time of this accident they were substantially the same as existed prior to the war and substantially the same as exist now?

A. That is right.

Q. None of the ships were blacked out or following a zig-zag course or anything of that nature, were they? A. No, sir.

Q. During the time, Captain, that you were Commanding Officer of the Roustabout, did you see any naval vessels or naval planes of any kind?

A. No, sir.

Q. Was the Roustabout the subject of any attack by enemy naval forces of any kind?

A. Never. [56]

Q. So far as your actual experience in the operation of that vessel, it was substantially the same as your experience before the war and your experience now except that you had a Navy crew on board the vessel that you were in command of?

A. Yes. It was a good deal the same.

Q. Referring to the cargo which you carried, as I understand you operated from Seattle primarily to the naval establishment at Sitka?

A. Yes, sir.

Q. And in the course of that operation you would pick up petroleum and miscellaneous dry stores to the limit of your capacity in Seattle and

(Testimony of Lawrence A. Parks.)

would take them up to Sitka and Ketchikan and those points that they desired them to be delivered at? A. That is **right**.

Q. As I understand from your statement, a substantial portion of the dry cargo that you carried northbound was ships stores?

A. Ships Service Stores is the word I used.

Q. Ships Service Stores; I misspoke myself. Would you just state the nature of Ships Service Stores for the record?

A. Well, Ships Service Stores would be anything that they would sell in the Ships Service store at these various [57] bases. That covers practically every article that you would find in any store, almost.

Q. What is a Ship's Service Store?

A. It is a store operated by the Navy for their own service men.

Q. For their own personnel? A. Yes, sir.

Q. That is, you could buy in a Ship's Service Store Coca Cola or a fountain pen or anything that you wanted of personal supplies?

A. That is right, sir.

Q. They correspond in the same manner as a Post Exchange in the Army?

A. That is right.

Q. Referring to the accident, itself, you were at that time returning from Sitka; where were you returning from at that time—where had you started from?

(Testimony of Lawrence A. Parks.)

A. I had been at Sitka and I imagine my last port of call had been Ketchikan.

Q. You were, then, returning to Seattle?

A. That is right.

Q. And the vessel at that time had only aboard water ballast to make navigation of it convenient and some miscellaneous dry cargo which you had picked up at these various ports? [58]

A. That is right.

Q. Dry cargo which probably was primarily oil drums and containers of that type and miscellaneous things that they wanted returned to Seattle?

A. That is right.

Q. Counsel was referring to this channel where the accident occurred. What is the condition of that channel to the westward—I mean as to the depth of water and the navigating conditions there?

A. The west side of the channel by the Campbell River—the river comes down and it is a flat out there, so all ships stay to the east side of the channel there.

Q. From your years of experience in navigating those waters, you had determined that it was relatively unsafe to get too close to the west side of that channel? A. That is correct.

Q. Prior to the collision with the Eastern Prince, did you see any lights of other vessels?

A. Yes, sir.

Q. What were the navigating conditions at that time; was the view obstructed or did you have a

(Testimony of Lawrence A. Parks.)

relatively clear opportunity to observe other vessels? A. A very clear night. [59]

Q. As you were proceeding south, you state that you observed the lights of other vessels; can you state the nature of the lights which you observed?

A. Two of these vessels were south vessels, northbound in the same channel, over on our starboard side. They were showing the customary navigation lights, in other words, they were showing a white light and a green light forward that I could see. Another one was southbound which I overtook and passed and it had a stern light, headlight, and the port light was visible to us. And then the Eastern Prince, as I found out later, had—all of the lights that I could see on it were three white lights.

Q. These vessels that you referred to, which were northbound, what was their character; I mean, what type of vessels were they?

A. They were, I imagine, small fishing boats. I couldn't tell just what they were, but they were very small.

Q. As a vessel approaches you under those circumstances, what lights should you see, Captain; that is, assuming a vessel going in the opposite direction from you, what lights should show?

A. That would depend upon which side they were on over my bow.

Q. Will you explain your answer? [60]

A. If they were on my right, I should see a

(Testimony of Lawrence A. Parks.)

white light and a green. If they were on my left, I should see a white light and a red.

Q. Where would the white light be?

A. I will qualify that, too. On large vessels you would see two white lights—a mast headlight and range light. On the smaller ones, it isn't necessary to carry the range light.

Q. You say you would see a white light and a red light or a white light and a green light; what would that indicate to you?

A. That would indicate to me the heading of that vessel; what side it was going to pass on.

Q. The red light would be its port light and the green light its starboard?

A. That is right.

Q. The white light which you referred to and the range light, what do those indicate to you?

A. Well, if they carry a range light, they are in line—one slightly aft and one slightly above the other; in other words, they will give you the heading of the other ship.

Q. When you see those two lights in that manner, you are then conscious of the fact that the vessel approaching is a fairly substantial vessel and the [61] range lights give you an opportunity to determine the exact direction of its course?

A. That is right.

Q. In the smaller vessels that you refer to, they normally carry only one small white light?

A. Most of them just carry a headlight.

(Testimony of Lawrence A. Parks.)

Q. Of course, in a case of a tug carrying a tow, it would have a different type of light, would it not? A. That is right.

Q. Which would signify to you the nature of the tow that you had? A. That is right.

Q. As he approached the Eastern Prince, did you see any navigating lights—that is, the red or green lights of the vessel? A. No, sir.

Q. What lights did you see?

A. I saw one white light up quite high, which I took to be a range light—as the range light is carried by smaller vessels, the range light shows around 360 degrees—and two lights seemingly close together down below.

Q. But you saw no navigating lights of any kind? A. Neither red nor green, no.

Q. Then as you continued to approach the Eastern Prince, [62] what opinion did you form as to the direction in which she was going?

A. I thought she was going in the same direction we were.

Q. In other words, you assumed that you were actually overtaking the Eastern Prince?

A. That is right.

Q. Counsel has referred to the change that you made in your course. Can you explain the nature of that change?

A. As we got closer to the other vessel, which later developed to be the Eastern Prince, the angle of the other vessel—the angle of the bow was closer: we were getting closer to it. So I hauled the Roust-

(Testimony of Lawrence A. Parks.)

about a little further to the left, still thinking we were overtaking it and passing too close to it.

Q. So that you turned your vessel in towards the left or portside with the thought of allowing additional space as you passed the vessel that you thought you were overtaking?

A. That is correct.

Q. During this entire period were you continuing to observe the Eastern Prince?

A. Yes, sir.

Q. When did you first become conscious of the fact that [63] you were not overtaking the Eastern Prince in the sense that the vessel was going the same direction that you were, and that you were overtaking it from the rear?

A. We were getting very close together and I believe the Eastern Prince hauled hard right. When they did so, I saw their red light then and I hauled the Roustabout hard left and went full astern.

Q. What contact was made between the vessel?

The Court: Before we get into that subject, perhaps this would be a good time to take our recess.

We will be in recess now until 2:00 o'clock this afternoon.

(At 12:00 noon, July 16th, 1947, proceedings recessed until 2:00 p.m., on the same day, in the United States Court House.) [64]

Seattle, Washington

July 16th, 1947, 2:00 p.m.

(All parties present as before.)

The Court: Are we ready, gentlemen?

Mr. Henke: Yes, your Honor.

Mr. Long: Yes, your Honor.

LAWRENCE A. PARKS

(Resumed)

Cross-Examination—(Continuing)

(Last question repeated by the reporter.)

Mr. Henke: Strike that question, will you, and we will start over again.

By Mr. Henke:

Q. Captain Parks, when we adjourned this noon, I believe you had stated that as you approached the Eastern Prince you were under the impression that the Eastern Prince was a vessel proceeding in the same direction as your own vessel, is that correct? [65] A. That is correct.

Q. When did you first become conscious of the fact that the Eastern Prince was not going in the same direction as the Roustabout but was actually proceeding in the opposite direction?

A. I don't remember exactly but it couldn't have been over a couple of minutes before the collision—a very short time before the collision.

Q. What occurred which brought to your attention the fact that the Eastern Prince was not going in the same direction as you were?

A. I saw their portside light.

Mr. Long: That is the red one?

The Witness: The red one, yes.

(Testimony of Lawrence A. Parks.)

Q. (By Mr. Henke): How did that appear—suddenly or in what manner?

A. I think they must have turned the Eastern Prince to the right some, which exposed the light.

Q. What did you do when you saw the light?

A. Put the engines full speed astern and our ship's rudder hard left.

Q. When that occurred, were both ships turning in the same direction—that is, towards the shore?

A. Opposite directions.

Q. Opposite directions? [66]

A. Both turning towards the shore, one turning left and one turning right.

Q. Your engines were fully reversed at that time?

A. Yes, sir.

Q. Approximately how far from the Eastern Prince were you at that time—that is, when you first became conscious of the existence of the port light of the Eastern Prince?

A. I don't recall. I could make a guess now but it has been five years ago and I don't recall just—

Q. We understand it would be an approximation, naturally, under the circumstances.

A. I would say within two hundred or three hundred feet.

Q. What portions of the vessels came in contact?

A. The bow of the Roustabout and the stern of the port quarter of the Eastern Prince.

(Testimony of Lawrence A. Parks.)

Q. What speed was the Roustabout going at the time of the contact? A. Practically stopped.

Q. What occurred when the two vessels made contact?

A. Oh, a very, very slight impact—sliding; they were still going under way ahead and we were practically stopped and just scraped along their stern.

Q. Did the Roustabout catch on any part of the Eastern Prince? [67] A. The boat davit.

Q. The boat davit, you say?

A. The boat davit, yes.

Q. Actually, do you think there would have been any contact between the vessels if the boat davit hadn't been located in that particular location?

A. It would have been very close.

Q. What damage was done to the Roustabout?

A. None.

Q. I take it from what you say that the prow of the Roustabout caught on this boat davit and the pressure of the Roustabout going by did damage the Eastern Prince.

A. I think it may have hit the port of the Eastern Prince anyway, but I don't think it would have done as much damage if it hadn't of hit that davit.

Q. The davit tended to pull part of the Eastern Prince with it? A. I believe so.

Q. What was the situation of the Eastern Prince, when you observed her at that time, as to

(Testimony of Lawrence A. Parks.)

her decks; did they have a substantial deckload on the Eastern Prince? A. Yes, they did.

Q. What was the nature of the deckload around the location of the navigating lights of the Eastern Prince— [68] the running lights?

A. I believe it concealed them from shining ahead.

Q. What was the nature of that deckload, can you recall?

A. It was construction material, lumber, I believe.

Q. And that was piled up high on the deck?

A. That is right.

Q. And by reason of that material being there, it was impossible for an oncoming vessel to see her port and starboard lights? A. That is right.

Mr. Long: I don't think the witness said that, your Honor. He said he believed it concealed the lights.

The Court: That is assuming a fact not yet in evidence.

Mr. Long: I object therefore to the form of the question.

The Court: Objection sustained.

Q. (By Mr. Henke): Can you state what the effect was, Mr. Parks, of the existence of this deckload on the port or starboard lights so far as visibility for any oncoming vessel was concerned?

A. I believe it would obscure them.

(Testimony of Lawrence A. Parks.)

Q. So that an oncoming vessel would only see the white [69] lights on the Eastern Prince?

A. Yes, sir.

Q. What was the situation as to these white lights that you saw? Were there any lights upon the Eastern Prince that were other than the regular navigating and running lights for such a vessel?

A. Yes, sir; they had the deck lights on aft around the cabin.

Q. Those lights were visible to you as you approached?

A. They were visible to me after they had changed course and not before.

Q. That is referring to the white lights that were on deck?

A. When I first saw the Eastern Prince, I could only see the one white light; later I could see the other two.

Q. Did you see one white light before you saw the red port light? A. Yes.

Q. There are a large number of fishing vessels that operate in these particular waters, are there not? A. Yes, sir.

Q. It is quite common, is it not, for you to see the one white light on such a vessel together with the lights from her cabin as you approach from the rear—is that not correct—in these waters? [70]

A. Yes.

Q. You had seen I suppose literally thousands

(Testimony of Lawrence A. Parks.)

of such lights and vessels in the course of your navigating in these waters?

A. A large number of them.

Mr. Henke: I believe that is all.

Redirect Examination

By Mr. Long:

Q. Captain, just a few questions. Discovery Passage is a portion or a segment of the usual inside route to Alaska, is it not? A. Yes, sir.

Q. And as such it is a rather heavily traveled channel by vessels going to and from Alaska and British Columbia? A. That is right.

Q. Isn't it true that that was particularly so during this period that we are discussing in as much as vessels were not traveling outside but rather all using the inside passage?

A. I believe that is correct.

Q. Why was it, Captain, that vessels were not using the outside passage during that period?

A. Are you speaking of American vessels only?

Q. American vessels, yes.

A. The routing officer, United States Navy, routed them all inside.

Q. Why?

A. Presumably because of the danger of enemy submarines outside.

Q. You say that you saw the Eastern Prince's port or red light approximately two minutes before the collision? A. That is just a rough guess.

Q. It is an approximation?

(Testimony of Lawrence A. Parks.)

A. Yes; it is an approximation.

Q. I understand that. That is why I use the word "approximately." A. Yes, sir.

Q. What speed was your vessel making over the ground when you saw the Eastern Prince's red light; that would be a combination of your water speed and current, wouldn't it?

A. That is right. I probably stated that in the log book or in my other deposition—I don't remember now. I know I figured it up at one time.

Q. I recollect that was about twelve knots over the ground; would that be approximately correct?

A. That would be approximately our speed.

Q. You stated that in your deposition in the other case of Link against the United States.

A. I knew I had stated it but I didn't know what the figure was.

Q. You would be making, then, approximately twelve knots over the ground or we will say approximately eight knots through the water. On a full astern bell at that speed, how soon could you bring your vessel to a dead stop in the water—from the time you reached for the telegraph, put your engines full astern and the engineer puts the throttles full astern and reverses the engines, do you stop?

A. We didn't have to contend with that up there. It was a Diesel-electric and you are full astern from the bridge.

(Testimony of Lawrence A. Parks.)

Q. What length of time would that take; what is your best judgment?

A. Three and one-half to four minutes.

Q. And you hadn't quite stopped dead in the water at the time of the collision?

A. Not quite, no; almost dead in the water.

Q. Now, at eight knots per hour, how many feet does your vessel make per minute—roughly 800 feet a minute, isn't that right?

A. Yes, eighty-five hundred. [73]

Q. That is right; about eighty-five hundred feet per minute at eight knots.

Mr. Henke: I didn't get those figures.

The Witness: About sixty-five hundred.

Q. (By Mr. Long): Yes; about 6500 feet per minute. A. 650.

Q. I think it is near eight hundred; but you say 650 and that is close enough for my purposes.

A. Yes.

Q. So in three minutes she would move roughly 1950 feet, would she, at that speed?

A. Yes, sir.

Q. That is a little better than a third of a mile, isn't it?

A. Are you taking into consideration that our wheel is right over and that the ship is running in a circle which slows us down?

Q. Somewhat. I am also taking into consideration that you are in a 4-knot current, too. I am thinking that even in still water at eight knots you

(Testimony of Lawrence A. Parks.)

were progressing about 650 feet per minute so in three minutes that would be 1900 plus feet which is something over a third of a mile, isn't it?

A. Yes, sir. [74]

Q. The Eastern Prince sustained substantial damage in this collision, did she not, Captain, to her stern—her port quarter?

A. I don't know just what the actual damage was.

Q. I don't know whether you made a survey. But she was damaged so that she couldn't proceed on her trip, was she not?

A. When I left, they were talking about proceeding on. Whether they did or not, I don't know.

Q. Your vessel was a steel vessel, was it not?

A. Yes.

Q. And the Eastern Prince was made of what material, her hull? A. Wood.

Q. And the point of contact, as I understand your testimony, your stem or bow struck the Eastern Prince on her port quarter?

A. That is right.

Q. That would mean aft on her portside or left side, would it not? A. Yes, sir.

Q. And at that time the Eastern Prince was turning to her right and you were turning to your left? A. Yes, sir.

Q. In other words, you were both turning toward the eastward [75] side of the channel?

A. Yes, sir.

(Testimony of Lawrence A. Parks.)

Mr. Long: I think that is all. Thank you.

Recross-Examination

By Mr. Henke:

Q. With regard to the fishing vessels which were in this area during all of the period that you were navigating these waters during the war, the fishing vessels were following their regular routine. were they not, of fishing in Alaska waters and the canneries were operating as usual?

A. I believe so.

Q. And these fishing vessels, of course, were operating both inside and outside of the passage-way?

A. I couldn't swear to that. I was always inside.

Q. But you are acquainted with the fact that during this entire period the Alaska cannery operations carried on in the same manner?

Mr. Long: That is not quite accurate there. They didn't. I don't know if the witness knows or not, but I know they didn't.

Mr. Henke: We may have to put you on.

Mr. Long: All right. I can testify to that. [76]

Q. (By Mr. Henke): So far as you know, the the fishing vessels operated in a normal manner in those waters, during the years you were there?

A. A lot of them didn't. For the Navy I took over about fourteen of them at Sitka and put Navy

(Testimony of Lawrence A. Parks.)

crews on them and ran them as patrol boats; so they weren't fishing then.

Q. I see. But the canneries were operating to the full extent that conditions permitted—they were operating in the normal business of canning salmon?

A. I believe some of them were operating.

Q. The taking of the vessels by the Navy was for the convenience of the Navy and not because the vessels were unable to operate in the cannery trade, isn't that it?

A. They were taken for the convenience of the Navy. That is it.

Mr. Henke: That is all.

Further Redirect Examination

By Mr. Long:

Q. Captain, as a matter of fact, some of the fishing vessels were made Coast Guard Auxiliary vessels while they were fishing, were they not? [77]

A. I don't know as to that. When war was declared, I was stationed at Sitka at that time, and we went out and grabbed every boat in the harbor that was suitable for the work we wanted done, in Alaska.

Q. That was true of all vessels, fishing vessels, barges, and so on, was it not?

A. That it right.

Mr. Long: That is all.

(Witness excused.)

Mr. Long: I called Captain Veusler. His testimony will be very short. I asked him to come tomorrow morning. We do have a witness now that we can call and he will be here very shortly.

The Court: We will take a short recess in this case.

(Short recess.)

Mr. Long: Captain Rose of the Eastern Prince was here all morning. He may have taken sick during the noon hour. I have another witness I can call.

The Court: All right. You may put him on.

Mr. Morrow: Mr. Mills, take the stand. [78]

DEAN ELWOOD MILLS

called as a witness by and on behalf of the libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrow:

Q. Will you state your full name?

A. Dean Elwood Mills.

Q. Where do you live?

A. Richmond Beach, Washington.

Q. What was your occupation in May, 1942?

A. I was a seaman aboard the Eastern Prince.

Q. What was the voyage of the Eastern Prince at that time?

A. The voyage was carrying supplies for the

(Testimony of Dean Elwood Mills.)

Alaska Road up the inside to Alaska for the Elliott Steamship Company.

Q. What was the nature of the cargo of the Eastern Prince?

A. Construction equipment, food, insulating material, lumber—just about everything they need for general construction work.

Q. What are you doing now, Mr. Mills?

A. I am going to the University of Washington, the College of Pharmacy.

Q. What is your age? [79]

A. Twenty-four.

Q. What licenses did you hold in May, 1942?

A. At that time I held ordinary seaman's certificate.

Q. That is the license issued by the Department of Commerce, is it? A. That is right.

Q. Will you just tell the court what your duties were aboard the Eastern Prince on the morning of—midnight, rather, of May 10th and the morning of May 11th, 1942?

A. I was the Quartermaster.

Q. What was your watch?

A. My watch was ordinarily 12:00 to 2:00, but because I was the most experienced helmsman aboard the ship, Captain Rose carried me over into the next watch to go through Seymour Narrows.

Q. Where is Seymour Narrows located?

A. Between Vancouver and British Columbia, the northern part.

(Testimony of Dean Elwood Mills.)

Q. What is the name of the Passage?

A. Discovery Passage.

Q. What does the Quartermaster do?

A. The Quartermaster is the helmsman. He steers the ship.

Q. Under whose orders? [80]

A. Under the Officer on watch who at that time was Captain Rose.

Q. Was there anybody else in the wheelhouse at midnight, May 10th, or the morning of May 11th besides yourself and Captain Rose? A. No.

Q. Would you tell what happened from the time you entered Discovery Passage northbound, Mr. Mills?

A. We entered Discovery Passage on the right side of the channel at a course of 212 degrees magnetic. We put Cape Mudge on our——

Q. Before you entered on this course of 312 magnetic, what did the vessel do with respect to the tides?

A. We laid to outside of the channel, waiting for the tide from Seymour Narrow.

Q. What time were you waiting outside the channel?

A. That would be right around 12:00 or 12:30 a.m.

Q. You state that you passed Cape Mudge after that to go through Seymour Narrows?

A. That is right.

Q. About what time was that?

A. That was about 1:15.

(Testimony of Dean Elwood Mills.)

Q. That would be a.m.? A. A.M.

Q. On May 11th? [81] A. That is right.

Q. On passing Cape Mudge, what course were you on? A. I was on 212 magnetic.

Q. Was that 212 or 312?

A. 312, rather; I am sorry.

Q. What speed was the Eastern Prince making through the water?

A. We were making between seven and eight knots.

Q. Was there any current at the time?

A. Yes. There was a rather strong tide running south out of the channel.

Q. What was the speed of the tide?

A. Well, approximately four knots.

Q. What would your speed then be over the ground?

A. Well, our speed over the ground would have been between three and four knots.

Q. After passing Cape Mudge, did you receive any orders from Captain Rose?

A. After we had proceeded well up into the channel, he ordered me to put the wheel over to the right, which I did; and after a few seconds he ordered the wheel steadied. As he ordered the wheel right, he gave one long blast on the air whistle.

Q. After you steadied, were there any further orders or observations which you made? [82]

A. My only observation at that time was mental, I presumed we were maneuvering for some reason;

(Testimony of Dean Elwood Mills.)

I didn't know what. Shortly after that, he ordered the wheel hard right and blew another blast.

Q. Did he make any remarks or say anything at that time?

A. He didn't say anything until just before the collision.

Q. Did you see anything yourself at that time?

A. As soon as I had put the wheel hard over, I looked up and I saw a red light coming towards us.

Q. Did you find later that was the port light of the Roustabout? A. That is right.

Q. And by port you mean the left light?

A. The left light.

Q. Prior to the time that you made the first change of course to the right, what was the course of the Roustabout with respect to mid-channel?

A. What was the course of the Roustabout?

Q. Yes; with respect to her position in the channel?

A. Well, the Roustabout was left of mid-channel.

Q. Whose left of mid-channel?

A. His left. He was to our right of mid-channel.

Q. By that I take it that you mean that the Eastern Prince was closer to the east shore of the channel? A. By far. [83]

Q. Where was the Roustabout with respect to mid-channel?

A. The Roustabout was east of mid-channel.

Q. The Roustabout likewise was east of mid-channel? A. That is right.

Q. About what time did the collision occur?

(Testimony of Dean Elwood Mills.)

A. About 2:15 a.m.

Q. Approximately where did the collision occur?

A. About an eighth of a mile from the east shore and about directly across from the Campbell River.

Q. Is that referred to as the Campbell River Bluff?

A. I think we were a little bit south of the Bluff yet but a little bit north of the town.

Mr. Morrow: Would you kindly mark the exhibit as Libelants' Exhibit 2?

(Hydrographic map of Discovery Passage marked Libelants' Exhibit 2 for identification.)

Q. (By Mr. Morrow): I hand you herewith, Mr. Mills, what has previously been marked Libelants' Exhibit 2. That is the chart before you. Can you identify the same? A. Yes.

Q. What is it?

A. That is a chart of Discovery Passage and Seymour Narrows.

Q. In British Columbia waters?

A. In British Columbia waters. [84]

Q. Is that an official chart? A. Yes, it is.

Q. Would you just take this red pencil, Mr. Mills, and indicate by a number "1" the approximate position the vessel was in while it was waiting for the tide in Seymour Narrows? Just make it a big "1" and put a circle around it.

A. (Witness writes on map.)

Mr. Morrow: I would like to offer this chart in evidence.

Mr. Henke: We have no objection to this chart.

(Testimony of Dean Elwood Mills.)

The Court: It may be admitted as Libelants' Exhibit 2.

(Libelants' Exhibit 2 received in evidence.)

Q. (By Mr. Morrow): What was the Eastern Prince doing at Position 1 of Libelants' Exhibit 2?

A. We were laying to, waiting for the tide to slack up coming out of the Narrows.

Q. Were you at anchor?

A. No. We were drifting.

Q. You have testified, as I recall, that you passed Cape Mudge about 1:15 a.m.

A. That is right.

Q. Will you indicate the vessel's approximate position [85] at the time she passed abeam of Cape Mudge by the number "2," with a circle around it in red pencil?

A. (Witness writes on map.)

Q. Would you please indicate also in a red pencil in a red cross the approximate position of the collision of the vessels?

A. (Witness writes on map.)

Q. At and prior to the collision, Mr. Mills, just where were you stationed on the Eastern Prince?

A. Prior to the collision?

Q. At and prior? A. I was at the wheel.

Q. At all times at the wheel? A. Yes.

Q. What time did you go on watch at the wheel?

A. 12:00 midnight.

Q. So that you had been at the wheel approximately two hours before the collision occurred?

A. That is right.

(Testimony of Dean Elwood Mills.)

Q. Were you in such a position that you could have heard any signals that might have been blown by the USS Roustabout? A. Yes.

Q. Did the USS Roustabout blow any whistles prior to the time of collision? [86]

A. I didn't hear any.

Q. Did she blow three when she went astern?

A. No.

Q. Prior and at the time of the collision, Mr. Mills, did you observe the condition of the lights aboard the Eastern Prince?

A. Yes; I checked the lights before I went on watch.

Q. What did you find on checking the lights of the Eastern Prince?

A. The lights were all burning brightly.

Q. Which lights were burning brightly?

A. The port and starboard running lights, and the white light on the masthead.

Q. When you refer to the port and starboard running lights you are referring to the red and green running lights, I take it?

A. That is right.

Q. Which is the red and which is the green?

A. The red is the port light.

Q. Which is the green?

A. The starboard light.

Q. Were there any other lights on the Eastern Prince showing?

A. There were two outside lights hanging under the overhang of the bridge. [87]

(Testimony of Dean Elwood Mills.)

(Photograph marked Libelants' Exhibit 3 for identification.)

Q. (By Mr. Morrow): I hand you herewith what has been marked Libelants' Exhibit Number 3 and ask you if you recognize the same?

A. Yes; this is the Eastern Prince.

Q. Is that a photograph of the Eastern Prince?

A. Yes.

Q. Is Libelants' Exhibit Number 3 a fair reproduction of the Eastern Prince as she existed in May, 1942?

A. Yes.

Mr. Morrow: I offer Libelants' Exhibit 3 in evidence.

Mr. Henke: No objection.

The Court: It may be admitted.

(Libelants' Exhibit 3 received in evidence.)

Q. (By Mr. Morrow): Would you please take a red pencil, Mr. Mills, and indicate by a cross the position of the running lights or running light as you see them in Libelants' Exhibit 3?

A. (Witness writes on map.)

Q. Would you run a line out from that cross in red pencil, up in here—or I will do it—and an arrow with a Figure "1," the cross indicating the position of one [88] of the running lights of the Eastern Prince?

(Mr. Morrow writes on map.)

Now, can you tell whether that is the starboard or the port running light?

A. That is the starboard light.

Q. At the time and shortly prior to the collision,

(Testimony of Dean Elwood Mills.)

was that light burning brightly? A. Yes.

Q. And was it visible to vessels ahead?

A. Yes.

Q. The Eastern Prince, I understood, carried a deck cargo on this particular voyage, did it not?

A. That is right.

Q. State whether or not the deck cargo obstructed the view of the running light in question?

A. No, it did not.

Q. How high did the deck cargo come up on the vessel?

A. The deck cargo didn't quite reach the level of the deck of the bridge.

Q. And you can so indicate that on Libelants' Exhibit 3, can you not? A. I can.

Q. Will you do so in red pencil?

A. (Witness writes on map.)

Q. Opposite that I will indicate a figure "2." (Mr. Morrow [89] writes on map)—to show the level of the deck cargo.

Was the port light or the green light likewise burning clearly? A. Yes, it was.

Q. The starboard light I meant,—green light?

A. Yes.

Q. And the port light was burning brightly?

A. Yes.

Q. Both were burning brightly?

A. That is right.

Q. After the collision occurred, what happened?

A. Well, after the collision occurred, Captain Rose sounded a general alarm. I made my way back

(Testimony of Dean Elwood Mills.)

to the starboard life boat and took the canvass off and stood by there.

Q. Did Captain Rose make any remarks at the time of the collision or shortly before?

A. Well, just before the collision he was looking out the window—that was about the time that the bow of the ship itself became visible—and he said “The dirty blanks are going to hit us.”

Q. Could you tell, Mr. Mills, whether the Roustabout had changed her course before she hit you?

A. Well, no, I couldn't tell whether she had or not. [90]

Q. Did it appear that she might have?

A. Well, I couldn't really swear to it because I was busy with that handwheel.

Q. How was she approaching when you saw her?

A. The Roustabout, when I saw her, was coming across the Channel heading in a southeasterly direction.

Q. Where and how did the vessels come in contact with each other?

A. Well, the vessels contacted about an eighth of a mile from the eastern shore,—her bow against our port quarter.

Q. By port quarter what do you mean?

A. The after rear.

Q. Do you mean the stern? A. The stern.

Q. Near the stern? A. On the left side.

Q. What side of the Eastern Prince was struck?

A. The left.

Q. Could you describe just the angle of the collision?

(Testimony of Dean Elwood Mills.)

A. The angle of collision was somewhere between, oh, thirty-five and forty-five degrees,—closer to forty-five degrees, I believe.

Q. In which direction was the Eastern Prince headed or what was she doing at the time of the collision? [91]

A. Well, at the time of the collision she was playing very rapidly towards the right.

Q. And that would be towards the east shore?

A. Towards the east shore.

Q. Approximately how far did she come from the east shore?

A. Do you mean how far was she from the east shore?

Q. How far was she from the east shore on her swing?

A. We started the swing at around a quarter of a mile, so it was something less than an eighth of a mile; perhaps a tenth or an eleventh of a mile.

Q. Could you see the shore?

A. Well, if I had had to look, I could see it, but I didn't pay much attention to it.

Q. How far was the Roustabout from the shore?

A. I could tell she was coming at a pretty good clip.

Q. Could you tell if she was swinging?

A. No, because all I could see was her red light and after I saw the red light it was too late to make calculations.

Q. Where did the Eastern Prince go after the collision?

(Testimony of Dean Elwood Mills.)

A. The Eastern Prince tied up at the Campbell River dock.

Q. Where did the Roustabout go?

A. The Roustabout, as I remember, dropped her anchor just off the dock. [92]

Q. Was there any conversation between the officers of the Roustabout and those of the Eastern Prince, Captain Rose, carried on in your presence?

A. Yes. Captain Parks from the Roustabout and some officer came to shore on the dock and from the Eastern Prince.

Mr. Henke: I think I should object to this as improper as to any conversations between the officers after the accident occurred. We are not bound by conversations of either one. It is merely something that happened afterwards.

Mr. Morrow: It is part of the *res gestae*. I can bring out from the conversation that occurred immediately after the collision within a short time. In addition to that, the Rules of Admiralty permit a very wide latitude in respect to such questions. The ordinary rules of questions with respect to law do not apply. Certainly this witness should be permitted to answer such a question.

Mr. Henke: You should lay a foundation as a part of the *res gestae*, as to how long it took them to get into the Campbell River, and so on.

The Court: Could you lay a better foundation?

Mr. Morrow: I will be glad to do so. [93]

Q. (By Mr. Morrow): How long after the collision occurred did you overhear this conversation?

(Testimony of Dean Elwood Mills.)

A. I would judge shorter than an hour; very little shorter.

Q. How long did it take you to get into the Campbell River after the collision?

A. Well, it didn't take very long to get in but it took a little time to survey the damage to find out if we could get in. That, I would say, took ten minutes. Then we had to dock and the Roustabout had to send a boat in.

Q. How long after Captain Rose met the officers of the Roustabout did the conversation occur?

A. Immediately. There was no delay there.

Q. I will ask you what the officers of the Roustabout said with respect to the collision?

Mr. Henke: We renew our objection that it is irrelevant, incompetent, and immaterial.

The Court: I am a little bit at a loss to,—I will put it this way: I doubt that it is a part of the *res gestae*. But I am a little bit at a loss to see the force of the objection. You state that you would not be bound by an admission. On what do you base that?

Mr. Henke: Well, these officers, so far as they are concerned of the vessel, are officers. They [94] are not agents or representatives of ours.

The Court: Don't you stand in the same position as one of the parties in this case?

Mr. Henke: Well, we are one of the parties but——

The Court: As one of the parties to the collision, don't you represent——

Mr. Henke: No. Our position, your Honor, is

(Testimony of Dean Elwood Mills.)

that we are merely insurers of the Eastern Prince. The question is whether or not she has suffered a war risk. As such,—the naval officers are no agents of ours and we have no responsibility for what they may do or say. Our position is that it is not an admission from any agent or representative of ours that they are attempting to quote.

Mr. Morrow: May it please the Court, in Admiralty matters, the Court is entitled to have the full story of a collision or any maritime matter. It certainly should have the story on this occasion.

Reading from Benedict, Section 381 B(5), it is stated:

“Admiralty causes are tried by a single judge without the aid of a jury. Hence the elaborate rules of evidence deemed necessary to protect the untrained jury are not required. Courts of Admiralty are not bound by all the rules of evidence which are applied in courts of common law and they may, where justice requires it, take notice of matters not strictly proved and may receive in evidence testimony which might not be admissible in other courts.”

Now, cases go on and on along that same vein. In the event of appeal in this case, why, the Circuit Court would try the matter *de novo*. They likewise are capable of determining the value of evidence. They want the full story. If this evidence is in any way irrelevant, immaterial, or incompetent, it is presumed that the court will judge its value and

(Testimony of Dean Elwood Mills.)

certainly the Circuit Court should be presented with the same opportunity.

The Circuit Court has the right to take even additional evidence. But for that reason, if for no other, all of the evidence that has any bearing on the subject is generally admitted in a trial of Admiralty matters.

The Court: The objection will be overruled. You may answer the question.

Mr. Henke: May an exception be noted, [96] your Honor?

The Court: Exception noted.

Mr. Morrow: I will re-ask the question.

Q. (By Mr. Morrow): What was stated by the officer or officers of the Roustabout on this occasion?

A. I heard Captain Parks tell Captain Rose that he hadn't seen the Eastern Prince until he was right on top of her.

Q. Did he have anything to say with respect to his officers on deck?

A. Well, I did hear him make the remark that he didn't have an officer of experience or responsibility on his bridge.

Q. Did he state the reason why he didn't?

A. Well, he said that they were all naval reservists who had never been to sea before.

Mr. Morrow: You may inquire.

Cross-Examination

By Mr. Henke:

Q. Captain Parks himself was on the bridge, wasn't he? A. He was.

(Testimony of Dean Elwood Mills.)

Q. Were you acquainted with Captain Parks' experience in [97] the navigation of Alaska waters?

A. No, I am not.

Q. You referred to the conversations, Mr. Mills. Do you recall that on or about May 15th, 1942, at Vancouver, B. C., you gave a statement as to how the accident occurred.

A. I believe I recall making a statement there.

Q. Your statement at that time, in regard to Captain Parks was as follows—was it not—“Some of the officers of the Roustabout were talking to Captain Rose on the dock at Campbell River. I heard them say to Captain Rose that they did not see any of the running lights of the Eastern Prince until right on top of her. At that time all of the running lights of the Eastern Prince were still burning brightly. The officers of the Roustabout said to Captain Rose, ‘We did not see your running lights until we were right on top of you.’ ”

Is that a fair statement of your recollection on May 15th, 1942, of what the officers of the Roustabout said? A. I believe that is very close.

Q. You would say that this statement that you gave on May 15th, 1942, would be a more accurate statement than your recollection at this time, would you not? [98]

A. Well, I don't think that is necessarily so because I have read my statements that I made at that time,—I made several—in very much detail and I have refreshed myself with them.

Q. When you gave this statement on May 15th,

(Testimony of Dean Elwood Mills.)

1942, you did not at that time recall or set forth any reflection by Captain Parks upon the competency of his officers, did you?

A. I was never asked.

Q. As I understand your testimony, there were only two of you on deck on the Eastern Prince at the time of the collision,—yourself and Captain Rose?

A. That is right.

Q. Where were you situated?

A. At the time of the collision?

Q. Yes. A. I was at the wheel.

Q. Where is the wheel situated?

A. The wheel is situated on the bridge.

Q. Could you take that exhibit—I believe it is 3—that you have there, and mark on it the approximate location of the wheel?

A. That is right. Mark that in red pencil?

Q. Yes; it would probably be “3,” would it?

A. It is very difficult to mark it on this because this [99] isn't a flat view. It is taken from the stern. The front of the pilot house or a straight angle of the pilot house isn't visible on this picture.

Q. Is the pilot house on the Eastern Prince level with the deck?

A. As I recall, there was one or two steps up into the bridge from the boat deck.

Q. As I recall your testimony, you did not see the Roustabout until she was practically on top of you, is that right?

A. Not at all. I saw the lights of the Roustabout—the red light—sometime before she was on

(Testimony of Dean Elwood Mills.)

top of us. I didn't see the Roustabout, herself, until she was right on top of us.

Q. As I have the statement here, your recollection on May 15th, 1942, was as follows—will you state whether this is correct or not—“We had proceeded on this course for approximately one hour or more but Captain Rose ordered me to put the wheel to the right, which order I immediately obeyed. In about 15 or 20 seconds after this order, the Captain blew one long blast on the air whistle. At this time I did not see the approaching vessel but sensed that one was coming towards us in view of the wheel order and the blast of the whistle. After the long blast [100] on the whistle, I received an order from Captain Rose to steady the wheel, which I did. Then Captain Rose gave a sharp order to put the wheel hard right and keep it there, which I did at once. After putting the wheel hard right, then I looked up and saw the red light of an approaching vessel.”

A. That is right.

Q. Isn't that an accurate statement of your recollection of what occurred?

A. It is very close.

Q. So that actually you didn't see the red light on the Roustabout until Captain Rose had given you the order to turn hard right?

A. That is correct.

Q. And that was the first time that you saw even the lights on the Roustabout?

A. That is right.

(Testimony of Dean Elwood Mills.)

Q. You stated, I believe, that this wheel on the Eastern Prince was a hand-operated wheel?

A. That is right.

Q. Do you mean by that that the entire force for turning the rudder is furnished by the helmsman?

A. The helmsman and a good deal of leverage on the rudder arm.

Q. That is, there is no steam to help turn it but the [101] pressure by the helmsman is what turns the rudder? A. That is right.

Q. As Quartermaster, was it one of your duties to maintain a lookout forward?

A. My main duty as Quartermaster was to watch the compass.

Q. Watch the compass and turn the wheel as directed by the Captain? A. That is right.

Q. Where was Captain Rose with respect to yourself?

A. Captain Rose was on my left, forward immediately of the cabin housewindows.

Q. Referring to the deck cargo which was on the Eastern Prince, what was the nature of this cargo? A. Lumber, crates.

Q. What type of lumber, do you recall?

A. I think it was mostly large, rough two by twelves and one by sixes and two by sixes.

Q. You say two by twelves and——

A. Two by sixes. It was more or less of a mixed deck cargo of lumber, with crates and that sort of thing thrown in.

(Testimony of Dean Elwood Mills.)

Q. Aft on your vessel there were a number of lights on the deck, were there not?

A. To the best of my knowledge there was one light on either side directly under the overhang of the bridge. [102]

Q. There was one electric light on each side directly under the overhang of the bridge?

A. That is right.

Q. Were those lights visible forward?

A. No.

Q. That is you wouldn't anticipate that an on-coming vessel could see those white lights?

A. I hardly think so.

Q. Why not?

A. Because the deck cargo came up to within a few inches of the level of the bridge deck, which the lights were a foot or a foot and a half under the deck of the bridge.

Q. I take it from what you say that the Eastern Prince had a passageway on the deck on each side of the pilothouse? A. That is right.

Q. And the overhang from the deck on top of the pilot house was extended out, was it?

A. That is right.

Q. Then attached to that overhang were these white lights? A. That is right.

Q. They, in your opinion, were not visible forward because the deck cargo came up to the top of the—— [103]

A. ——within a short distance of the top, that is right.

(Testimony of Dean Elwood Mills.)

Q. —of that area? A. Yes.

Q. Were there any other lights aft of that?

A. Well, there may have been a light in the galley. The galley was aft on the main deck.

Q. But this would have been inside of the vessel?

A. That would have been porthole lights.

Q. There were no other exposed lights on the deck? A. On the deck, no, sir.

Q. Other than these two white lights which were alongside of the pilothouse?

A. That is right.

Q. Now, as I understand, your first order that you had from Captain Rose was to turn hard right and then some twenty seconds or so later he gave you an order to sound your air whistle?

A. No. The first order was not a hard right signal. The first order was a right signal.

Q. Yes; you are right. After that order to turn to the right, there was an interval and then he ordered you to blow the whistle?

A. As I recall, Captain Rose blew the whistle himself, while I was getting her hard over.

Q. As I have your previous statement, it was "About 15 [104] or 20 seconds after this order, the Captain blew one long blast on the air whistle." That was after your first turn to the right.

How long an interval would you say it was between Captain Rose's first order to you to steady the wheel and his second order to turn hard right?

A. Well, that is rather hard to say but it was under a minute. It was just a matter of seconds.

(Testimony of Dean Elwood Mills.)

Q. In other words, the whole incident was over in a matter of a very few minutes?

A. Well, I have to allow time to get that wheel over but it was a short time.

Q. Getting that clear: You had the first order from Captain Rose to turn the wheel to the right?

A. Right.

Q. And you immediately proceeded to do that immediately upon his order?

A. That is correct.

Q. Then about twenty seconds after that the Captain sounded one blast on his air whistle?

A. Well, the blast on the air whistle was while I was getting on the course,—just a matter of seconds; I didn't know just how many.

Q. Do you mean while you were turning right and getting steady on the course? [105]

A. As I remember, the whistle was blown as I steadied on the course.

Q. Then you steadied on the course and just a few seconds after that he gave the order hard right?

A. That is right.

Q. I didn't understand you very clearly when they asked you the question as to your acting as helmsman, here. I think you said that Captain Rose had you stand an extra watch, did he, because you were the most experienced helmsman he had?

A. Not an extra watch,—part of an extra watch. I was to stand by at the wheel until such time as we were through the Narrows.

Q. When would your watch normally have ended? A. At 2:00 o'clock.

(Testimony of Dean Elwood Mills.)

Q. At 2:00 o'clock? A. In the morning.

Q. So he was having you continue on after your watch until the vessel got through this particular area, is that right? A. That is correct.

Q. How long would you have continued then?

A. I would say another fifteen minutes or twenty minutes, something like that. It depends on how we had to maneuver to get through the Narrows.

Q. I believe you said that you are twenty-four now? A. That is right.

Q. Then you would have been nineteen in May of 1942? A. That is correct.

Mr. Henke: I believe that is all.

Redirect Examination

By Mr. Morrow:

Q. Mr. Mills, I believe you stated that the Eastern Prince was loaded? A. That is correct.

Q. By reason thereof, did she set low in the water?

A. Well, she didn't set too low. She was a wooden ship and they don't set too low.

Q. How did she compare to the Roustabout?

A. Very much lower than the Roustabout.

Q. Those from the bridge of the Roustabout, in viewing the Eastern Prince, would have an angle of vision, would they? A. They would.

Q. What would be the nature of that angle?

A. Officers on the bridge of the Roustabout would have looked down on the bridge of the Eastern Prince.

Q. Would that have better enabled them to view

(Testimony of Dean Elwood Mills.)

the running [107] lights of the Eastern Prince?

A. Yes, it would.

Q. I believe Mr. Henke asked you if these little white lights were on top of the pilot house. I got your answer that they were and I would like to clear up just the exact position of these little white lights. You have before you Libelants' Exhibit 3 showing the Eastern Prince. Will you take and indicate thereon, if you can, the position of the white lights in question? Make a little round circle and then draw a line out over here and mark it "3."

A. I thought I stated that they were under the overhang. (Witness draws on photograph.)

Q. That clears it up then. And it is understood that the white lights in question were under the overhang of the boat deck; is that correct, Mr. Mills?

A. That is correct.

Q. With respect to the running lights——

The Court: Is that the overhang of the boat deck?

The Witness: Of the boat deck.

Q. (By Mr. Morrow): Would you just make another line and mark it "4" and show the level of the boat deck?

A. (Witness draws on photograph.)

Mr. Morrow: The witness has indicated the boat deck by running an arrow to the level of the boat deck.

Q. (By Mr. Morrow). With respect to the elevation of this small white light in question which is under the overhang of the boat deck, is that light

(Testimony of Dean Elwood Mills.)

of lower or higher elevation than the red and green running lights? A. Lower.

Q. Approximately how much lower?

A. At least two and one-half feet,—three feet; easy three feet. We had elevated running lights.

Q. I believe it was your testimony that the deck cargo was in such position that it covered the little white lights which were under the overhanging boat deck? A. That is right.

Mr. Morrow: No further questions.

Recross-Examination

By Mr. Henke:

Q. Did the deck cargo come up to the level of the boat deck or above the boat deck?

A. As I recall, it was very close. You had to step down two or three inches to get down from the bridge deck to the boat deck.

Mr. Morrow: You said the bridge deck? [109]

The Witness: That is the boat deck.

Mr. Morrow: That is the boat deck.

Q. (By Mr. Henke): So that when you stepped out of the pilot house on the Eastern Prince, you could walk over to the edge of the boat deck and step down approximately one foot——

A. No; somewhat less than a foot.

Q. Something less than a foot?

A. Something less than a foot.

The Court: Didn't you say two and one-half inches?

The Witness: Two or three inches, something like that; it was just a little bit lower.

(Testimony of Dean Elwood Mills.)

The Court: Which is it,—a foot or two and one-half inches?

The Witness: It is just about two and one-half inches.

Further Redirect Examination

By Mr. Morrow:

Q. As I understand, the pilot house is a little above the boat deck? A. That is right. [110]

Q. How far?

A. I believe there were two steps.

Q. Two steps?

A. From the boat deck to the pilot house deck.

Mr. Morrow: That is all.

Mr. Henke: That is all.

(Witness Excused.)

Mr. Long: Your Honor, Captain Rose has been quite ill during the last few months and was taken ill during the noon hour. I haven't had a chance to find out whether he can resume the stand or not. He collapsed over in Frederick & Nelson's store.

I will ask him if he would like to take the stand now.

(Short recess.)

The Court: You may now proceed, gentlemen.

Mr. Morrow: I will ask Captain Rose to take the stand. [111]

GEORGE WILLIAM ROSE

called as a witness by and on behalf of Libelants, having been first duly sworn, was examined and testified as follows:

(Testimony of George William Rose.)

Direct Examination

By Mr. Morrow:

Q. Your first name is George W. Rose?

A. George William Rose.

Q. I understand that you had an attack during the day. You were here this morning, weren't you?

A. Yes.

Q. Do you feel all right,—like you can go on now?

A. Yes, I do.

Q. How old are you, Captain?

A. Seventy-five.

Q. Have you had an illness since this collision occurred?

A. I retired from marine work three years ago. Two years of that I was sick. I am convalescent now and getting along first rate. I tire very easily.

Q. Prior to your illness, what was the condition of your hearing?

A. My hearing before I retired was very good. That is one of the reasons of my retirement was my hearing commenced to get poor. [112]

Q. Captain, what licenses do you hold?

A. I hold a Master's Unlimited License, any tonnage, any waters; and Pilot License for Puget Sound and Southeastern Alaska. Here is my license, if the Court wishes to see it. (Witness indicates document.)

Q. Thank you very much, Captain.

How long have you been going to sea, Captain?

A. Fifty-five years.

(Testimony of George William Rose.)

Q. How long did you go to sea under a Master's ticket?

A. I had my Master's Ocean License since shortly before the first World War,—some thirty odd years now. I have had some form of license since 1892. That is forty-five years ago.

Q. On May 11th, 1942, you were Master of the Eastern Prince? A. I was.

Q. What voyage was she on, on that occasion, Captain?

A. On her first voyage under the ownership of Mr. Link.

A. Where did that voyage start and when?

A. That voyage was started in Seattle, where we loaded, and left there on the 10th of May, 1942.

Q. Where did the collision occur, Captain?

A. The collision occurred off a place known to mariners as Campbell River Bluff; right opposite Campbell River which empties into Discovery Passage in [113] Canadian waters.

Q. You have before you, Captain, what has been referred to as libelants' Exhibit Number 2. Is that **the chart from the Eastern Prince**, can you state?

A. I can't say as to where it originated, but it is a standard chart of the Edition of 1921 and has been the authorized navigation aid since that time.

Q. Was it that chart or an identical chart that you had aboard the vessel on the occasion of the collision in question? A. It is.

Q. Captain, have you indicated on that chart the approximate point of the collision?

(Testimony of George William Rose.)

A. I have.

Q. How have you indicated that,—in blue pencil?

A. A red cross in a blue circle.

Q. There is a red cross in a blue circle; and that is whereabouts in what waters?

A. That is in the waters of Discovery Passage.

Q. Do you recall, Captain, the approximate time that collision occurred?

A. The collision occurred between 2:00 and 2:10 o'clock in the morning of May 11, 1942.

Q. Will you tell the court the circumstances that occurred leading up to the time of the collision?

A. Will you repeat your question?

Q. What were the circumstances, Captain, leading up to the time of the collision,—the navigation of your vessel and other circumstances prior to the time of the collision?

A. We were proceeding on a voyage from Seattle to Prince Rupert first port of call. We had bad weather the night we left,—bad weather crossing the Straits of Juan de Fuca. When we got up here we were what is called by navigators late on the tide which runs very swiftly in Seymour Passage. So I was idling along—that is running slow—when the Chief asked me if he could stop her to make some minor adjustments to the machinery and I said, yes. We drifted around off and a little south of Cape Mudge.

Q. Let the record show that the Captain is referring to an area which has previously been indicated by the witness Mills as a red "1" in a circle; is that correct?

A. Yes; about there.

(Testimony of George William Rose.)

Q. Then you started to go through Discovery Passage, did you, Captain?

A. Then, when he reported O.K., I started up at two-thirds speed because I was ahead of the time of slack [115] water at Seymour Narrows if I run full speed. The tide which ebbs south in this Passage at a very high speed was running south at the time.

Q. How fast, Captain?

A. I judge it was making in the Narrows about ten miles and down here about four or five miles.

Q. You have pointed to the vicinity of Cape Mudge?

A. Yes; down as far as Cape Mudge.

Q. How fast was the Eastern Prince traveling?

A. The Eastern Prince was going eight miles an hour on her engine revolutions.

Q. By that you mean through the water?

A. Through the water.

Q. What time was she making over the ground?

A. Four to five miles over the ground. With a head tide of four or five miles down here, that would give her four miles over the ground.

Q. Will you just go on from there Captain, and tell how the collision occurred; start out,—when did you first observe the Roustabout?

A. When I was pretty near up to Campbell River Bluff, I saw the lights of a vessel from three to five miles ahead of us coming south toward us. This vessel had very good lights,—excellent running lights, and the night was very clear, a beautiful

(Testimony of George William Rose.)

night. And I [116] had no trouble in distinguishing his lights. He came down showing his green light. That was all right with me. But I said to the Quartermaster, "We will get a little further over on our side of the Channel."

Q. Captain, when you saw his green light, how did that bear to your vessel?

A. Oh, I would say about three degrees off our port bow. Under "International Law" which is the strictest traffic law on the highway, vessels in a narrow channel are compelled by that law to stay on the right-hand side of the said channel. They can't cross over. If they do, why, they are just dead at fault for violating the fault. So I was hanging onto my side of the Channel,—the right-hand side—and was probably an eighth of a mile off of Campbell River Bluff or would be at the time I got there. At this time I was a little below it.

After I saw the green light, I went over to the right of the channel some more and then told the Quartermaster "Steady." That meant to line her up straight as she was going. He did that.

Q. Did you sound any whistle signals?

A. No, I didn't blow any signal then. The other vessel was too far away. But the other vessel was coming [117] down full speed with a flood tide and she was getting over the ground pretty fast; I should judge at least fourteen or fifteen miles an hour. She came down at that rapid pace and soon lessened the distance between us, while we were not much more than moving. Then he showed his red light again

(Testimony of George William Rose.)

which I argued to myself that he must have changed his course off Steep Island which would cause him to show me his red light. But he at that time certainly, if he had kept a good lookout, would have seen our red light.

Q. Did he blow any signals when he changed his course?

A. He did not. Then when he showed us his red light, I said to the Quartermaster "Hard a'port" and keep her there. What is that bastard going to do?" I shut out his red light again. I received no answer from the approaching vessel. Well, then, he had me checkmated. Under the law, I couldn't cross back. I couldn't blow him any other whistle. I couldn't use any other means of identification, and if I kept going the way I was I would be on the beach. So I said to Mills, the man that was at the wheel, "Let her come clear around and take them stern on."

Q. Which way were you swinging then, Captain?

A. We were swinging to the right as fast as the vessel could swing. [118]

Q. I take it that would be toward the east shore of the channel?

A. Yes. I was around so far then that I was heading a little bit to the right of the direct beam of the shore.

Q. Did you indicate your change in course by a whistle signal?

A. When I gave that order "Hard right" to

(Testimony of George William Rose.)

Mills, I reached up at the same time and blew a passing whistle; one whistle, five seconds duration.

Q. Captain, as a Master Mariner, state whether or not in your opinion that Discovery Passage in the vicinity of the collision is or is not a narrow channel under the International Rules?

A. Certainly it is a narrow channel. It is less than a mile in width.

Q. Were you navigating the Eastern Prince with respect to the narrow channel rule at the time?

A. I was navigating on International Rules which say that in a narrow channel, in any country anywhere in the world, one vessel coming and one going, each must stay on his own right-hand side away from the middle line of such channel. This channel here is three-quarters of a mile wide. A mid-channel course would be three-eighths of a mile from the center line. I was within [119] one-eighth of a mile of the shore, which was two-eighths between me and the center line. This fellow was coming down here and he hits me.

Q. Where was he in regard to that center line?

I would just like to have you answer that question, Captain.

Mr. Henke: If your Honor please, I don't like to object but I do think that Counsel is leading the witness rather decidedly. It is more of an argument as to what happened than as to the state of the facts.

Mr. Morrow: I don't think I am leading the witness. The witness is telling the story and I have asked him some questions and interrupted him.

(Testimony of George William Rose.)

Let's have the last question.

(Last question read by the reporter.)

The Court: The objection was to its being leading. The objection is overruled.

The Witness: I just want to explain to the Judge that in the investigation before the Inspectors I was held blameless.

Now that is supreme authority.

The position I state in this court is that I was blameless in this accident and I was in the right and my ship was in the right. The other fellow was in the wrong.

Mr. Henke: If your Honor please, I move it all be stricken as not responsive to the question.

The Court: It may go out,—that part of it.

Mr. Henke: I want to extend Counsel and the witness every courtesy but I——

The Court: That last remark of the witness may go out.

Q. (By Mr. Morrow): Captain, where was the Roustabout navigating; on what course was she navigating with respect to mid-channel at the time you first observed her?

A. Well, she was over on the left of the mid-channel.

Q. On her left?

A. And still going more to her left.

Q. By left, do you mean to the east?

A. To the east,—to her left.

Q. In other words, she was on your side of the channel?

A. Yes.

(Testimony of George William Rose.)

Q. Your side of the road?

A. That made me go to the right to stay within my rights.

Q. Did the Roustabout blow any whistle signals?

A. Never at any time.

Q. After the collision occurred, Captain, what did the [121] Eastern Prince do; did you make a survey of the damage and go some place, or what happened?

A. After the collision,—the point of collision?

Q. Yes.

A. Well, the engineer stopped the engine. I turned on the general alarm.

Mr. Morrow: Captain, do you feel O.K.?

The Witness: Yes.

The Court: Let him take his time.

A. (Continuing): We commenced to drift south with the current, back towards Cape Mudge. I told him to put out the port life boat, to get it ready,—swing it out. While they were engaged getting out the life boat, the chief engineer come up and says, “Captain, she is not making any water.” I said to him, “Then we won’t need to beach her.” He said, “No. I think she will get along all right.” There was some conversation and he went down below, still looking at things in general and getting ready in case something unexpected happened.

Mr. Henke: If your Honor please, I think Counsel should realize that this has nothing to do with the case at all. I am willing to extend every courtesy

(Testimony of George William Rose.)

but I think Counsel should correspondingly endeavor to cover the situation. [122]

Mr. Morrow: I will shorten it for the benefit of the witness.

Q. (By Mr. Morrow): Captain, I just want to ask you a few more questions in this case. I don't want to unduly burden your testimony here on the stand to make it inconvenient for you.

What damage occurred to the Eastern Prince by reason of the collision?

A. The bow of the Roustabout made a fracture in her about sixteen inches deep. If she hadn't been such a blunt-bowed ship, she would have cut half way through her. The bow shoved the whole stern section over and lifted it about six inches, displacing all of the timbers and breaking some of the ribs, crumpling up the deck planking and shifting the rudder stock so that we had to pry it back in place in order to make the vessel steer.

Then when we got to Campbell River in order that that part of the stern which was so weakened wouldn't fall off, taking the rudder with it, we took a winch cable and put it under that stern to hold that part up. It is a good thing we did so because it would have dropped off before we got back to Vancouver. [123]

Q. Did the Eastern Prince continue her voyage from that point to destination?

A. I beg your pardon?

Q. Did the Eastern Prince finish her voyage on that occasion?

(Testimony of George William Rose.)

A. She did not. I phoned immediately to the construction company who had her chartered for the government. They got in connection with the underwriters and the underwriters sent Captain Clark up there. He happened to be coming up there anyway on another case; and he surveyed us as we were made fast to the Campbell River dock, where we went after we were through inspecting the damage.

Q. Then you returned and went back to Vancouver?

A. We returned to Vancouver, where the cargo was discharged and we went into the McDonald Steamship Yard or Shipbuilding Yard and the stern was rebuilt.

Q. Captain, getting back to the condition of the Eastern Prince, what lights did she display aboard at the time of the collision?

A. The Eastern Prince had the bright white headlight and a red side light and a green starboard light,—red port light. These lights conformed to the law. On the after end of the main deck, as the vessel has only one mast, was a white light. It would only show aft to an overtaking vessel but would not show forward. Back on the overhang of the house, showing down on the alleyways of each side of the house, were two lights. These lights were on a 110 volt circuit with 25 watt bulbs enclosed in a glass cage and a bronze metal work screen for shielding. With a high deckload, these lights could only show down on the narrow space of the deck, an alleyway

(Testimony of George William Rose.)

about three feet wide. Those lights could not be seen forward of the beam.

Q. You mean by an approaching vessel?

A. By an approaching vessel. Because if they could have they would have blinded me in my navigation.

Q. Captain, with respect to your red and green running lights, do you know what size globe,—what size they were?

A. The running lights were regular government-inspected Frensel lens light. They had 50-watt lamps in them. The government issued——

Q. Do you mean they had 50-watt lamps before the collision sometime?

A. Before the collision.

Q. What size did they have at the time of the collision?

A. The government issued an order for all vessels to dim their lights. So I removed the 50-watt bulbs [125] and installed 25-watt bulbs; and that is what they had at the time.

Q. What agency or department of the government issued those instructions, Captain?

A. I think the Navy issued them to the Coast Guard because the Coast Guard makes announcement of certain regulations in relation to marine matters.

Mr. Henke: If your Honor please, I think if testimony is to be given as to certain Orders, the Orders themselves should be introduced rather than someone's recollection of some indefinite statement

(Testimony of George William Rose.)

that the Navy or Coast Guard or someone had issued an order.

There is no suggestion of that at any point in this case and I don't think it is properly introduced at this time.

Mr. Morrow: If Counsel insists, I can go into some further foundations, but under the liberal rules for admitting evidence in Admiralty cases, I think the Captain is well qualified.

The Court: I think the Captain was in a position at that time to know something about those Orders and the source from which they came. The objection will be overruled.

Q. (By Mr. Morrow): By your answer to the last question, [126] I take it to mean that you received your instructions—at that time anyway—from the United States Coast Guard?

A. I read it in the public press as issued by the Coast Guard.

Q. Do you likewise receive orders and instructions from the Coast Guard?

Mr. Henke: "from the public press."

A. No, not direct.

Mr. Morrow: You did not on this occasion receive it direct?

A. Not direct, no. I got mine through the newspaper.

Mr. Henke: To keep the record clear, I will move that all testimony with regard to this purported order be stricken as the witness' only knowl-

(Testimony of George William Rose.)

edge was from something he read in the newspaper.

The Court: Motion granted. It will go out.

Q. (By Mr. Morrow): At the time of the collision, Captain, how far would your 25-watt lights be visible by an approaching vessel?

A. Oh, I should say three miles.

Q. Captain, you have described Discovery Passage as a narrow channel. State whether in your opinion it is safe and practical to navigate on both sides of the [127] Channel; that is, the west side of the channel west of mid-channel as well as east of mid-channel.

A. There is the chart, and the chart gives "40 fathoms"; "52 fathoms" close to Campbell River Bluff; and it gives 34 fathoms on the opposite shore,—close to the opposite shore. That is water enough to navigate scows like that. Both sides of the channel are what are called "bold." You can go close to them.

Q. I take your answer to mean that it is safe and practical, in your opinion, to navigate——

A. On both sides of the mid-channel; perfectly safe.

Q. In Discovery Passage, where the collision occurred?

A. Yes, sir. In going back to Campbell River dock we had to navigate on the left-hand side.

Q. Did the Roustabout navigate over there, too; did the Roustabout navigate over to Campbell River, too?

A. The Roustabout came up and anchored off

(Testimony of George William Rose.)

Campbell River dock. They had to come up the left-hand side of the channel. I went into and tied up to the dock.

Mr. Morrow: You may inquire.

Cross-Examination

By Mr. Henke:

Q. Captain, the witness who was on the stand before testified that the deck load on the forward part of [128] your vessel came up within two and one-half or three inches of the top of the boat deck. Is that your recollection, too?

A. On the after part of the deck load, even with the boat deck, I stopped them from putting any more load on that part and then made them break off forward,—taper off, so that it was kind of going down, so you could get forward to handle the vessel's lines and winches and so forth.

Q. Would you say that there was about two and one-half inches between the top of the cargo on the forward deck and the boat deck?

A. No. My memory says it was just about even.

Q. There were two lights on the main deck on each side of the pilot house, were there not?

A. Those two lights were down on the main house, right off the engine room.

Q. They were on the alleyway on the main deck?

A. They showed under the overhang of the main deck house down onto the main deck of the vessel.

Q. Yes, that is right. And you would say that

(Testimony of George William Rose.)

they were about even with where your running lights were?

A. No, sir; they were not even. They were at least three feet below the running lights. [129]

Q. Yes. I was saying in respect to the—

A. The running lights are about three feet above the boat deck, with screens on. Very, very good lights.

Q. Your running lights, you say, were about three feet above the running lights on the main deck, is that right?

A. Repeat your question.

Q. Your running lights were about three feet above the white lights that were on the main deck?

A. Yes, sir; three feet or more.

Q. Would you say that they were about even,—that is, relative to the fore and aft position on the vessel,—the white lights and the running lights were about even, weren't they; that is, in relation to the front and rear of the vessel?

Mr. Morrow: Do you mean in the middle?

Mr. Henke: I don't know where his running lights were.

Mr. Morrow: The picture is up there. It shows.

The Witness: I don't quite get your question. Pardon me.

Q. (By Mr. Henke): Referring to these two white lights that were on the main deck, they were in about the same perpendicular position, were they not, with the running lights? [130]

Q. Where were they in relation to them?

(Testimony of George William Rose.)

A. As I stated they were down under the overhang of the boat dock——

Q. I realize they were down under the overhang; but in respect to the fore and aft position?

A. The first little white light was about six feet back of the running lights and the next was about ten feet further back from that. Neither one of them could be seen from forward and a ship would have to be almost a'beam before she could even see them.

Q. Were there four white lights, then?

A. Two on each side.

Q. Two on each side of the vessel?

A. Mister, if a man couldn't see the bright running lights and a bright headlight, he never in God's World could see those two little dim lights.

Q. They were both the same wattage, weren't they? A. What?

Q. Didn't you say that they were all 25-watt lights?

A. Yes. But one had nothing but a glass cage around it and the others were backed by a Frensel lens, which magnifies the light.

Q. But one was white and the other was colored?

A. The headlight was a Frensel lens light. If a man couldn't see that, he couldn't see those red and green [131] lights.

Q. Captain, would you say that when you were coming southbound at a distance of between two and three miles of the——

A. Wait a minute.

Q. I beg your pardon. Captain, would you say

(Testimony of George William Rose.)

that when the Roustabout was coming southbound at a distance of between two and three miles she showed a bright green light to you? A. Yes.

Q. That indicated that if you continued on your respective courses, you would pass her on her starboard side or right side?

A. I would pass to her right, yes; that would be her starboard side.

Q. Now, the green light that you saw on the Roustabout was a very good light, wasn't it?

A. Excellent; almost as good as ours.

Q. At that time, when you saw the green light, you gave instructions to the Quartermaster of the Eastern Prince to turn to the right, did you not?

A. Yes.

Q. Now, your reason for doing that was that there were a number of fishing or motor vessels between you and the Roustabout, is that correct?

A. No, sir. My object in doing that was to present my red light to the approaching vessel and to get further over on my own side of the channel.

Q. Wasn't your recollection at that time that the Roustabout——

A. At that time the Roustabout had passed that fleet of fishing vessels that was south of them.

Q. Wasn't it your thought that the Roustabout was going to have to change its course in view of the existence of those small motor-craft there?

A. He might have changed his course. I knew, when his lights changed position, that he had changed his course when I thought he was off Steep

(Testimony of George William Rose.)

Island. Then he changed his course a second time. I couldn't understand that. The people on the Roustabout never saw any lights. They told me right at the time of the collision,—Harry Parks says, "George, I didn't see your lights at all,—no lights whatever." If he couldn't see our bright running lights, he never could see any other lights.

Mr. Henke: I will ask that the last statement be stricken as voluntary.

The Court: It may go out as not responsive.

Q. (By Mr. Henke): As I understand your testimony, as [133] you saw the Roustabout approach she was showing you a green light?

A. She showed us her green lights 'way off,—two or three miles.

Q. If you continued on the course that you were then on and she continued on the course she was then on, you both would have passed starboard to starboard, would you not?

A. I didn't change my course, and he changed his twice; by the change in the appearance of his light I judged that he had changed his course. When I changed my course, I blew him one whistle, but she never answered.

Q. Let me get this clear. You saw the Roustabout coming and when you first saw her you picked up her green light and if she had continued on her course and you had continued on your course you would have passed starboard to starboard, is that right?

A. We never would have got by each other. As

(Testimony of George William Rose.)

I edged in to the eastward, toward the shore on my side, he edged to his left, closer to the shore. What he did that for, I don't know.

Q. I just want to go over it step by step to get it clear in my mind. When you first saw the Roustabout, you saw her green light? [134]

A. Yes.

Q. Now, presumptively if you had continued on your course and the Roustabout had continued on her course, you would have passed starboard to starboard?

A. No; because she was coming this way and I was going this way (indicating). She was coming three points on my bow and I was going straight ahead. I was steering 312,—

Q. Why would you not have seen her port light then?

A. —and I never got off that because before it was time for me to change that course, the Roustabout had hit us.

Q. If the situation was as you recite there, why did you not see the port light of the Roustabout?

A. I saw the port light of the Roustabout afterwards. That showed to me, or at least in my silent presumption, that he had changed his course, and he had changed it to the left.

Q. You don't know that the Roustabout changed its course except that your position relative to his lights changed, then?

A. Well, I know he was just about off Steep Island and all the Alaska pilots change course there.

(Testimony of George William Rose.)

I presumed—I didn't know it for a fact—I presumed that he was changing course. That made me try to get [135] away from contact with him. But still I had to obey the law and stay on my own side.

Q. You presumed that he had changed course at that time because it was customary for Alaska pilots to change their course at that point, is that right?

A. Yes.

Q. Acting on that presumption, you turned to your right?

A. When I saw both of his lights, I would have to do something or he would run me down because he hadn't answered my whistle and he had me in a jackpot. So I went to the right. When I went to the right, hard a'port, I blew him one whistle.

Q. Well, at that time, if I understand your testimony, the Roustabout was from three to five miles from you, is that right?

A. Three to five miles.

Q. Is that correct—at the time you changed your course the Roustabout, according to your computation, was about three to five miles from you?

A. Not when I first saw her. She ran quite a while, and I kept on and on and on, on my course, before I saw that we were leading to trouble. Then I blew him a passing signal.

It is the rule established by the Alaska Steamship Company and adhered to by most other vessels for the southbound vessel to always blow a passing signal first. That is understood by all Alaska pilots. I waited for him, when he saw my lights, to blow the

(Testimony of George William Rose.)

passing signal first but when he didn't blow a whistle, then I blew one. But he never saw the Eastern Prince. He never saw her until just before he hit her.

Q. You only blew your whistle once, didn't you Captain?

A. Only once. Under the law, I couldn't blow any other whistle.

Q. During this entire time, you only gave one whistle signal? A. Yes.

Q. Am I to understand that that was not because you changed your course, but because you were indicating how you were going to pass the Roustabout?

A. Well, when I saw both of his lights coming, it was up to me to look out for myself because I thought danger existed because he didn't answer me. Then, when he was within about two miles of me, I blew that passing signal, which he never answered. And then I know there was trouble,—in fact, I said to the Quartermaster, "That God-damed bastard is going to hit us surer than hell; what the hell is he trying to do?"

Q. Well, now, this all occurred, of course, just a very [137] short period before the collision that you are referring to now?

A. I can't hear you.

Q. I say what you are referring to now occurred just a very few seconds or minutes before the collision, isn't that right?

A. As to the whistle?

Mr. Henke: Well, strike that.

(Testimony of George William Rose.)

The Court: Isn't there an exception in Admiralty practice that when we are hearing from the Captain we don't have any ordinary common law?

Mr. Long: It frequently happens, your Honor.

The Witness: The attorney speaks too low.

The Court: What was your question?

Mr. Henke: I have abandoned the question, your Honor. I will approach the problem from another angle.

Q. (By Mr. Henke): Captain, as I understand, you first saw the green light on the Roustabout?

A. I did.

Q. And then, without altering your course, you saw a red light on the Roustabout, is that right?

A. I did.

Q. Then, did you alter your course when you saw the red [138] light?

A. I started to go to the right a little bit so as to shut out his red light again and only get his green light. As long as we had his green light, we were safe. Then, after I shut out his red light, in a minute or so he showed it again. Then I made a lot of profane remarks about what the hell he was trying to do,—crowding me over on my side of the channel; why didn't he go out on his own side of the channel.

Q. Captain, when you first saw this green light that you refer to of the Roustabout, you would have passed starboard to starboard, would you not, in which event the Roustabout would have been close

(Testimony of George William Rose.)

to the shore and you would have been away from the east shore?

A. And I would have been on the shore. I would change course at Campbell River Bluff—change course to my left, but I wanted to get by this approaching vessel before I attempted to cross in front of him. If we had both pursued it, another five minutes for me and I would have been on the beach and he would have been going astern of me.

Q. You would have been on the beach on the east shore? A. The east shore, yes.

Q. Why would that be if you were both passing starboard to starboard, because then the Roustabout would have [139] been closest to the shore, would it not? A. No.

Q. If you are going north and the Roustabout is coming south, and you pass starboard to starboard— A. That would have been all right.

Q. The Roustabout would have been closest to the east shore, would it not?

A. He was close to the east shore as it was.

Mr. Morrow: May it please the Court, the answer to that is obvious. The Captain has testified that the green light was off his port bow—therefore, it was off to the left. Counsel has asked the witness several times if it wouldn't be true that the vessels would pass starboard to starboard. The Captain has testified no it wouldn't and has illustrated that the vessels were on an angle. I think that is very clear.

(Testimony of George William Rose.)

Mr. Henke: It may be clear to Counsel. It is not to me. I am sorry for being so stupid.

The Court: Just state your question again, please.

Q. (By Mr. Henke): In view of the statement of Counsel: Did you see the green light approaching from your port? [140] A. Could I?

Q. Where did you see the green light of the Roustabout approaching from? A. When?

Q. Where? A. Where?

Mr. Long: Ask him how it bore from his vessel and then he will know what you are talking about.

Mr. Henke: All right.

Q. (By Mr. Henke): How did the green light of the Roustabout bear from your vessel?

A. About three points off of our port bow.

Mr. Morrow: Ask him what he means by three points.

The Witness: Three points; that is 33 degrees.

Q. (By Mr. Henke): In view of the fact that we have this chart here, Captain, I wonder if you would mind marking on it the position of the Roustabout and the position of the Eastern Prince at this time, designating by an arrow the manner in which the vessels were moving. A. At what time?

Q. At the time you first saw the Roustabout and saw this bright green light that you refer to. [141]

A. When I first saw the Roustabout I should judge that she was somewhere about there (indicating).

Q. All right. Will you make an arrow showing

(Testimony of George William Rose.)

the manner in which the Roustabout was moving at that time?

A. She comes through Seymour Narrows off Cape Race and then went on a course down to Steep Island. Ships steer very badly here in that the tide race is very swift, full of eddies and swirls and overfalls. It is very hard to steer a ship—especially one coming southbound light; a loaded ship steers better. I think this is about the course of the Roustabout. (Witness draws on chart.)

We came up from Cape Mudge, here, on a course of 312, expecting to make the next change off this Campbell River Bluff. We were probably coming up here. (Witness draws on chart.)

When I say “him,”—

Q. Will you put an arrow on there to indicate the manner in which the vessels were moving?

A. (Witness draws on chart.)

Q. Does that arrow indicate approximately the position of the Roustabout when you first saw her?

A. Yes—there. (Witness draws on chart.)

Q. Will you put an “R” there to indicate the Roustabout?

A. The Eastern Prince was down about here. (Witness draws [142] on chart.)

Mr. Long: What are you putting there to represent the Eastern Prince?

The Witness: “E.W.” A pilot coming north would change at this point—

Q. (By Mr. Henke): When you say “change at this point,” you refer to what point?

(Testimony of George William Rose.)

A. Campbell River Bluff.

Now, Mister, if I kept going I would go right in shore here; do you see?

If he kept going, and made no change—if we both kept our course, why, he would go in shore here (Indicating) This is a narrow channel; you haven't got much room to fool around in it; do you see?

Mr. Morrow: I think the record should show that the Captain has gone over this chart without the advantage of parallel rules or dividers and that his drawings are only approximations.

Mr. Long: That is right.

The Court: The record may so show.

A. (Continuing) I can't understand why Larry Parks, when he changed her—

Mr. Long: Off Steep Island you are indicating.

A. (Continuing) Swinging to his left and showed me his red light. If he can explain that he is a dandy.

Mr. Henke: I will ask that the voluntary statement be stricken.

The Court: It may go out.

A. (Continuing) Of course, he may have thought he had the whole place to himself.

The Court: That statement may go out.

Mr. Henke: Would it be convenient for you to return tomorrow morning?

The Witness: It is all right with me.

The Court: We will be in recess until tomorrow morning at 10:00 o'clock.

(At 4:55 p.m., Wednesday, July 16th, 1947,
proceeding recessed until 10:00 a.m., Thursday,
July 17th, 1947.) [144]

Seattle, Washington
July 17th, 1947, 10:00 a.m.

(All parties present as before.)

The Court: Are you ready?

Mr. Long: We are ready to proceed, your
Honor. With counsel and the Court's permission,
I would like to put on Admiral Zeusler and then
proceed.

Mr. Henke: No objection.

The Court: That is all right.

FREDERICK ZEUSLER,

called as a witness by and on behalf of Libelants,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Long:

Q. Will you state your full name to the Court,
please, Admiral? A. Frederick Zeusler.

Q. Where do you live? [145] A. Seattle.

Q. What is your present status, Admiral, in
connection with the United States Coast Guard?

A. I am retired.

Q. With what rank? A. Admiral.

Q. What generally was your service, Admiral,

(Testimony of Frederick Zeusler.)

in the Coast Guard while on active duty; you might just trace it for the Court, generally, please.

A. I had approximately thirty-nine years of active service starting from Academy days. I served all over the United States, spending approximately thirteen and one-half years in Alaska. I served during the Emergency a part of the time in Alaska under, first, Captain Parker and then Admiral Reeves and then Admiral Whiting.

I was then in command of the Floating Forces in the early days—Senior Coast Guard Officer for Coast Guard matters and on the staff of the respective COMAL Sections. By COMAL Section I mean the Commands of the Alaska Sector which was the name of the Command in the early days of the war.

Q. Were you in charge of those duties during the early part of 1942 and particularly during the month of May, 1942? [146]

A. Yes, sir. My testimony will cover approximately the first six months of 1942. I feel that is sufficient to cover this particular case.

Q. Yes, there is, Admiral, and I appreciate your confining your testimony to that period which is here material.

So that we may have it precisely in the record, just what was your rank and your duties, during the first six months of 1942?

A. I was a Captain of the Coast Guard, Senior Coast Guard Officer and in Command of Floating Units in the Sector.

Q. Which Sector?

(Testimony of Frederick Zeusler.)

A. The Sitka Sector, at that time reaching out as far as Dutch Harbor.

Q. In the Territory of Alaska?

A. Yes, sir. Later on we divided our area into a number of Sectors which subdivided the original sector.

Q. How far south of Sitka did your jurisdiction reach? A. As far as Dickson Entrance.

Q. Also in the Territory of Alaska?

A. Yes, sir.

Q. Are you and were you during the period we are discussing acquainted with the vessel USS Roustabout?

A. Yes, sir. The USS Roustabout was used as a tanker and general service vessel between Seattle and bases in [147] Alaska. While in Alaska we used her for various duties, depending on the conditions that existed. In the early days it was absolutely necessary to make use of everything—every type of craft we could possibly get; fishing vessels, towboats, anything that was available, because our equipment in Alaska was extremely bad. We were limited to very few types of craft, so that when we got a vessel of any kind whatsoever we converted her as fast as we could and made her available for any type of duty that we needed. The Roustabout was used primarily in shuttle service between here and Alaska. But in Alaska, whenever it was necessary to transport equipment from one base to another—either north or south—we used her; when it was necessary to escort in Alaskan waters, if I

(Testimony of Frederick Zeusler.)

had vessels going across open waters, and she was available—I usually let her go as a sort of a motor ship.

Q. Was she armed at that time?

A. She was.

Q. And at that time, Captain Zeusler, in what status was she in the Navy?

A. She was a commissioned vessel, the same as any of the other vessels that we have, manned by commissioned officers and men. [148]

Q. During the period we are discussing and particularly May of 1942, what if any war bases were located in the city of Seattle, having to do with the United States Navy?

A. Pier 91, I think, was used; Manchester was used. Bremerton was used.

Q. What was the function, in so far as the Alaska Sector which you have described is concerned of the bases in Seattle and Puget Sound?

A. Those bases furnished the gasoline and ordnance equipment and materials that we needed for Alaska.

Q. At that time—it has been agreed, of course—that there was a state of war existing between the Empire of Japan and this country? A. Yes.

Q. Was there any war activity as such in your Sector during May, 1942?

A. In this answer I will confine my remarks to approximate dates. I don't think it is necessary to go into details.

Q. No; that is quite all right.

(Testimony of Frederick Zeusler.)

A. We had reports from planes, ships, patrol vessels, fishermen of submarine activities on the 22nd of January, the 7th of February, the 22nd of March, the 1st of April, the 12th of April, the 23rd of May, the [149] 7th of June, the 13th of June, the 7th of July and the 20th of July.

Q. What, if anything, did you do or was done under your orders or command in reference to that war activity; what did our Forces do?

A. I was in Command of the Floating Units and coordinated floating units with the aviation units from Sitka, Annette Island, Port Armstrong and Port Althorp.

I might say that we finally got our first submarine on July 9th. That submarine was sunk about thirty miles off the west coast of Prince William—I will have to check on that Island.

Q. What general locality?

A. Approximate latitude of 51 degrees, 21 minutes, 2 seconds; longitude, 134 degrees, 40 minutes, and 7 seconds west. Following the middle of June, the was attacked by a submarine and she managed to escape but was pretty well peppered with shots.

In July the *Arcadia*, a merchant vessel, was sunk one hundred miles south of Kodiak. One of our fishermen—that we had inducted into the Service—picked up a crew. She was then in an auxiliary status.

Q. Admiral, what if any war bases in your Sector, in [150] the Territory of Alaska, were served

(Testimony of Frederick Zeusler.)

by the USS Roustabout during the month of May, 1942?

A. In direct service they were usually the bases at Ketchikan and Sitka.

Q. Were those war bases? A. Yes, sir.

Q. Active?

A. Active—extremely active. The other bases that were serviced were Port Althorp, which was a Navy auxiliary facility, Juneau, which was a section base, Port Armstrong, which was a Navy auxiliary facility. We had to send her out to Kodiak on a number of occasions, and she also visited Seward, both of which were also active sections.

Q. What was the nature of the cargo carried by the USS Roustabout between the naval stations or bases in Seattle and the bases which you have indicated in your Sector in Alaska?

A. As far as I remember—of course, I did not check generally speaking—northbound, usually ordnance material, bombs—

Mr. Henke: If your Honor please, I object to the witness answering this question. I don't think any proper foundation has been laid of his knowledge of what the Roustabout carried. [151]

The Court: Strike the answer, then.

Q. (By Mr. Long): Are you familiar with the activity of the Roustabout during May, 1942?

A. Yes.

Q. Are you acquainted with her cargo and what

(Testimony of Frederick Zeusler.)

she transported from Seattle bases to the war bases in the north?

A. The only time I checked on her was when she was carrying petroleum and bombs for the air base at Sitka and the air base at Annette Island.

Q. Was that during May, 1942?

A. That was; yes, sir.

Q. And you know that of your own personal knowledge? A. I do, yes, sir.

Q. Was the Roustabout under your jurisdiction when she reached your Sector? A. Yes, sir.

Q. Was she subject to your orders while in your sector? A. She was.

Q. What was her duty during this period with respect to the carriage of any southbound cargo from the Sector back to Seattle?

A. On southbound cargo she usually picked up such materials as had to be sent south. I just remember empty drums, [152] cases—

Q. What kind of cases?

A. Broken—oh, some old ordnance material, Coast Guard tanks and occasionally personnel.

Q. By personnel you mean what type of personnel? A. Enlisted personnel.

Q. Of the United States Navy or Coast Guard?

A. Both.

Q. During the period of May, 1942, I will ask you whether or not the Roustabout had a function to perform on her southbound trips in connection with the war effort?

(Testimony of Frederick Zeusler.)

A. Just the normal function of any naval vessel to be on the alert and be prepared for activity of any kind.

Q. Did she have a function to perform in the carriage of any cargo southbound during that period?

A. Well, she always carried cargo of some sort. I am really not in a position to tell what she carried in those days except what I have seen them put aboard as I have stated.

Q. During that period was the Roustabout engaged in other than United States Naval Service?

A. No, sir.

Q. Did she carry any commercial cargo either northbound or southbound during that period?

A. Not while in my territory. [153]

Q. Was she employed as a merchant vessel at any time during that period? A. No, sir.

Q. In connection with the bases which you have mentioned, Sitka, Port Althorp, and these other bases, what, if any activity in connection with the prosecution of the war was being conducted at those bases; I don't mean the detail but in general the nature of the war operations there?

A. From Port Althorp we operated patrol boats and two planes. Those patrol boats and planes were used at the entrance—were used to check on enemy activity at the entrance to that particular port. At Juneau we maintained section bases—section bases where we had approximately four patrol craft. At Sitka we had floating patrol craft

(Testimony of Frederick Zeusler.)

and planes. Those planes were used to scout off-shore for enemy submarines, especially with regard to convoys. At Port Armstrong we maintained patrol boats and some planes and they were used to scout off-shore and also to patrol the entrance, because those days we did not allow large, slow craft to go off shore. We made most of the vessels go inside because of the fact that we knew submarines were off the American coast or off the Alaska coast. In many cases those [154] vessels were usually formed into convoys and taken across in formation. From Ketchikan we operated patrol craft and two planes. Annette Island's planes and Ketchikan's planes were used for patrolling the Dixon Entrance Sector.

Q. What function did the Roustabout serve, Admiral, in connection with the operation of surface aircraft at these bases during May of '42?

A. The materials that she brought to us were used to service these craft.

Mr. Long: I have a chart which is a little larger, if your Honor please, to put on an easel but I have it on a table. I think it might be helpful to your Honor. Maybe we can adjourn over here to this table so we can see it.

May it be marked as Libelants' Exhibit.

(Chart, Cape Flattery to Dixon Entrance, marked Libelants' Exhibit 4 for identification.)

Q. (By Mr. Long): I will show you what has been marked as Libelants' Exhibit 4. Are you

(Testimony of Frederick Zeusler.)

familiar with the two charts which comprise this exhibit? A. Yes, sir.

Q. Are they official Navy Hydrographic office charts? [155]

A. They are official charts posted by the Coast Geodetic Survey Service.

Q. They are CG&S? A. Yes, sir.

Q. Will you indicate to the Court by drawing around the spot with a red circle the Naval Base at Sitka?

A. (Witness draws on chart.) That is also an Air Station.

Q. And the Naval Base at Port Althorp?

A. (Witness draws on chart.) That is here. We used that to form our convoys to cross the Sound and patrol off that area.

Q. And Port Armstrong?

A. Yes. (Witness draws on Chart.) That is in this general area here.

Q. That is all right; just make a round circle in the general area.

A. (Witness draws on chart.)

Q. And Juneau, which incidentally is the capital of Alaska, is it not? A. Yes.

Q. Ketchikan?

A. (Witness draws on chart.)

Q. And Annette Island.

A. Annette Island which was a combined base for the Army and Navy. [156]

Q. Does this map also show Discovery Passage?

A. Yes. (Witness indicates.)

(Testimony of Frederick Zeusler.)

Q. May I just indicate that with a red arrow? I will put "DP" opposite it to indicate Discovery Passage. And that is in British Columbia waters, is it not? A. Yes, sir.

Q. The Admiral has indicated an "X" with a circle around it on the upper portion of Exhibit 4, I will ask you what that indicates, Admiral?

A. That indicates the approximate position of the sinking of a Japanese submarine on July 9th.

Q. Can we write "Jap Sub" opposite that?

A. (Witness writes on chart.) The Commanding Officers, who were engaged in this operation, were given Legions of Merit by the Secretary of the Navy.

Mr. Long: I think that is all. I will offer that chart in evidence, if your Honor please.

The Court: Is there any objection?

Mr. Henke: No.

The Court: It may be received.

(Libelants' Exhibit 4 received in evidence.)

Q. (By Mr. Long): When you refer to the inside route; generally speaking, without drawing a line, will you just trace for the Court from Seattle what is regarded [157] as the inside route to Alaska?

Mr. Henke: I think he should mark it.

Mr. Long: Just take a blue pencil. It is understood that it is not a navigation chart.

A. (Witness draws a blue line on chart.) That is the general course we insisted upon vessels tak-

(Testimony of Frederick Zeusler.)

ing during the war because of the fact that we had insufficient units and because of the enemy off-shore.

Q. Do you mean in May, 1942? A. Yes.

Q. You have indicated by a blue line the route from Puget Sound to in the vicinity of Graham Island?

A. Yes, sir. We allowed some vessels, who had high speeds, to go off shore. But any merchant vessel of slow speed was usually routed by the inside passage. They usually checked off at Ketchikan and from there went up either around this Sector here, and up or around through Juneau and up.

Q. Around through Icy Straits?

A. Yes. I might state that during the war it was our intention to issue orders for a general blackout at all times but we found it was really more dangerous to keep the lights out in the Inside Passage than it was to let them go offshore. So except in a very few cases we kept all lights burning on the Inside [158] Passage.

I might mention an instance of the Columbia. In one case there we turned off the lights in the Inside Passage and the Columbia landed high and dry on a mud bank. We figured it was safer to go inside with lights burning than to go inside with lights out.

The Court: Is there any objection to the introduction of that exhibit?

Mr. Henke: No objection.

(Testimony of Frederick Zeusler.)

The Court: It will be admitted in evidence as Exhibit 4.

(Libelants' Exhibit 4 received in evidence.)

Q. (By Mr. Long): If a vessel is bound from Seattle to Sitka, we will say, which in peacetimes is the more direct and safe route from a navigational standpoint—inside or outside?

A. The safest would be the outside. But the practice has been for most craft engaged in the Alaska run to take the Inside Passage. But for men not versed in the navigation of the Inside Passage, many of them will go—all of them will go outside.

Q. During May of 1942, what can you tell the Court as to the essentiality of the Roustabout in the war operations in Alaska; was she useless or useful? [159]

Mr. Henke: I don't think that question calls for an answer. We will assume they wouldn't have used her unless she was useful.

Mr. Long: I want to bring out, your Honor, that this vessel was an integral part of the war operation and very essential. The Admiral knows that and I would like to have it in the record.

The Court: What is your objection to the question?

Mr. Henke: I think that the question answers itself—whether she was useful or not useful—then so was very vessel which plied between here and Alaska.

(Testimony of Frederick Zeusler.)

The Court: Don't you think this witness understands what is meant by the question?

Mr. Long: I think so. I don't want to lead him.

The Court: The objection will be overruled.

Mr. Henke: Exception.

A. She was definitely essential because of the fact that this was an extreme shortage of different types of craft. She served so many different purposes that we definitely needed her.

Mr. Long: I think that is all. Mr. Henke, you may examine. [159-A]

Cross-Examination

By Mr. Henke:

Q. Admiral, are you acquainted with the physical characteristics of the Roustabout?

A. I could not describe her, no, sir; I have never been aboard.

Q. Do you know her age?

A. I do not, sir.

Q. Do you know what type of work she was engaged in before she was taken over at the beginning of the war?

A. I understand carrying petroleum products.

Q. Do you know her speed?

A. Not very fast; I think around eight knots.

Q. Yes; I believe they testified it was around eight knots.

Do you know the speed of a Liberty—DC-2 Liberty?

(Testimony of Frederick Zeusler.)

A. Well, that varies depending on the type; I should say thirteen to fifteen.

Q. So a regular Liberty would be about twice as fast, so far as speed was concerned, as the Roustabout?
A. That is right; approximately.

Q. Referring again to an ordinary Liberty, she would normally carry more armament than the Roustabout would carry, would she not? [160]

A. I would like to explain my answer in this way: At the beginning of the emergency we were definitely—we were in desperate need of armament. We had to make use of everything we could find, good and bad. I am positive that had we had more and better equipment the Roustabout would have gotten better equipment than she had.

Q. I think that is correct. If you could have gotten better than her, you would have obtained the best you could?
A. That is right.

The Court: I don't understand the Admiral's statement there.

In the event you could have gotten better equipment, how would that have affected the Roustabout?

The Witness: We would have given her better equipment all around, better guns and better aerial protection equipment.

Q. Actually, the fact is, is it not, Admiral, that the ordinary merchantmen would carry better armament than the Roustabout?

A. Larger caliber.

(Testimony of Frederick Zeusler.)

Mr. Long: I think the Liberty that Counsel refers to was not built in May, 1942. If he refers to thereafter, I have no objection to the question.

Mr. Henke: Do you mean there were no Liberties in May, 1942?

Mr. Long: Very few, if any.

Mr. Henke: If Counsel wants to testify to that fact, I will be glad to examine him.

Mr. Long: No. If you just confine your questions, I will have no objection.

Q. (By Mr. Henke): So you would say that as far as the Roustabout is concerned, she was less well armed than an ordinary merchant vessel or DC2 as we know it?

A. With respect to caliber, yes, sir; she had smaller stern guns, yes.

Q. The Roustabout may therefore be said to be a very slow craft and she is not the type of craft that you would normally risk in any substantial operation?

A. That is true. But I want to amplify that statement by saying that the two vessels that sank the submarine were manned by two 3-inch 23's and two 6-pounders which were even smaller caliber than the Roustabout's. We were using, as I say, the equipment we had. Therefore, it is not fair for us to compare an efficiently armed vessel with the equipment that we were using at that particular time. [162]

Q. Yes. But, Admiral, you wouldn't attempt to

(Testimony of Frederick Zeusler.)

tell the Court that the Roustabout is the type of vessel that would be used for any naval operation as such; she was just a plain, very slow tanker?

A. The Roustabout was faster than one of the patrol boats that sank the submarine; and it had better armament than one of those.

Q. All right. Let's go back to that then, Admiral. What were these patrol boats that you refer to?

A. One was a 125 footer and one was a converted halibut craft.

Q. The 125 footer, was that designated as a patrol boat?

A. Designed for Coast Guard patrol duty.

Q. It was one of the Coast Guard patrol boats which was designed prior to the war?

A. That is correct.

Q. What was its speed?

A. About eleven knots, maximum.

Q. And it was designed for Coastal Patrol work, was it not?

A. Servicing lights and rendering assistance in the smaller inlets.

Q. Well, it wasn't a light ship, though?

A. No.

Q. And it wasn't a service vessel? [163]

A. Not for harbor, no.

Q. It was a servicing vessel?

A. That is right, and for the purpose of servicing unwatched lights.

(Testimony of Frederick Zeusler.)

Q. And the other vessel was a converted troller?

A. A converted halibuter approximately 80 feet long making approximately eight knots.

Q. And those vessels were designed and in fact being employed for coastal work at that time?

A. That is correct.

Q. Naturally, small vessels of that type would carry relatively small arms; they couldn't carry anything very heavy?

A. That is correct.

Q. The base at Sitka extended over what distance, did you say?

A. The base at Sitka was our major base. Our planes were serviced from Sitka.

Q. Was there ever any enemy attacks on Sitka?

A. No, sir.

Q. Were there any enemy attacks on Juneau?

A. Not during that time.

Q. Were there any enemy attacks at any time upon any of the points that you marked with the red pencil on the chart of Alaska? [164]

A. Submarines were sighted in Dixon Entrance within half a mile—or make it a mile—of Annette Island. Submarines were sighted off our observation posts off the west coast within a mile of the shore.

Q. Well, Japanese submarines were sighted off the coasts of Oregon, Washington, and California, as well, were they not?

A. Yes, sir; but the submarines sank ships up there, too.

(Testimony of Frederick Zeusler.)

Q. As a matter of fact, off the coast of Washington, vessels ran without lights, didn't they?

A. Yes, sir.

Q. And off the coast of Washington they required a so-called brownout so as to prevent the reflection of lights?

A. Yes, sir.

Q. One Japanese submarine went so far as to fire on a point in California, didn't it?

A. It fired on a point in British Columbia, too.

Q. Submarines have that particular characteristic. Did you ever have any submarines in the Inland Passage?

A. Dixon Entrance.

Q. That was the only point inside?

A. In the Inside Passage, yes, sir—at Dixon Entrance.

Q. So that it was typical of the entire Pacific Ocean that the submarines of both forces more or less roved [165] at will, did they not?

A. I don't know what you mean "at will."

Q. Well, our submarines were all over Japanese waters. Theirs, to the best of their ability, came over here and both sides patrolled against them?

A. I don't think I am in a position to answer that question because it involves certain technicalities that I cannot give you.

Q. All right. What would be the nearest enemy attack that was made on any place; it would be Dutch Harbor, wouldn't it, that there was any action? There was one air raid there, I believe.

(Testimony of Frederick Zeusler.)

A. Dutch Harbor—yes, sir; the nearest land attack.

Q. How far is Dutch Harbor from Sitka?

A. Approximately 1100 miles I should say.

Q. Approximately 1100 miles?

A. I should say that. I am confining my statements primarily to the first six months. I am not in a position to give any information beyond that so therefore my information is not exactly correct when it comes to the period beyond the end of July of that year.

Mr. Long: '42?

The Witness: '42, yes, sir. [166]

Q. (By Mr. Henke): You were transferred to other duty at that time, were you?

A. No, sir. I was transferred from Alaska in the middle of 1944.

Q. How far are the Islands which the Japanese occupied in the Aleutians from Sitka?

A. That I do not know. Attu is 900 miles from Dutch Harbor and Adak is approximately 780, something like that. But I don't know the exact distances.

Q. So that would be around—

A. Approximately 2,000 miles.

Q. Approximately 2,000 miles?

A. Yes, sir.

Q. That would be approximately the distance say from here to Chicago as an example, as the corresponding distance?

(Testimony of Frederick Zeusler.)

A. I don't know the distance from here to Chicago; so I am not in a position to answer that.

Q. I have to confine it to places across the ocean! Well, the Inland Passage, as I understand it, Admiral, is the Passage which is commonly used by most of the vessels operating in the Alaska trade, is it not?

A. That is the Alaska Steam, Alaska Transportation, Northland Transportation, and the Canadian ships; yes, sir. [167]

Mr. Henke: I think that is all.

Redirect Examination

By Mr. Long:

Q. Despite the fact that the Japanese hadn't landed with their land forces at Sitka in Southeastern Alaska, was any effort being made by the Navy and Coast Guard to guard against any such invasion and attack?

A. Yes, sir; and also the Canadian Forces.

Q. While land forces of the Japanese or the Army didn't land in Southeastern Alaska, was there activity of their surface craft—submarine or surface craft in Southeastern Alaska?

A. Yes, sir; quite pronounced.

Mr. Long: That is all.

Recross-Examination

By Mr. Henke:

Q. Were there any Japanese surface craft in Southeastern Alaska?

(Testimony of Frederick Zeusler.)

A. No, sir; just subsurface craft.

Q. Just submarine activity? A. Yes, sir.

Q. And so far as protecting Alaska was concerned, the Navy was sparing no effort to protect all of the rest of the [168] Pacific Coast as well, was it not, against any kind of attack?

A. The largest surface craft were never stationed in Southeastern; they were always stationed to the westward.

Mr. Henke: I believe that is all. Thank you, Admiral.

Mr. Long: Thank you, Admiral, very kindly.

(Witness excused.)

Mr. Long: I believe you were examining the Captain.

CAPTAIN GEORGE WILLIAM ROSE

(Resumed)

Cross-Examination—(Continuing)

By Mr. Henke:

Q. Captain, do you know how old the Eastern Prince was?

A. Well, I did know but I have forgotten the date she was built in Boston.

Q. You say she was built in Boston?

A. Yes.

Q. Was she built since 1900; was she built after 1900?

A. Well, I wouldn't state that positively. But she was [169] not a very old vessel. I think she was within the 20-year limit. When they made the

(Testimony of Captain George William Rose.)

repairs in Vancouver, she didn't show any age--no deterioration to speak of.

Q. Captain, referring now to the accident itself, how far away was the Roustabout when you first sighted it—when you first saw it?

A. When I first sighted the Roustabout, between three and five miles.

Q. As I recall your statement yesterday, you anticipated that it would turn at a particular point in coming down the channel, is that right?

A. Repeat it, please?

Mr. Henke: Will you read the question, Mr. Reporter?

(Last question repeated by the reporter.)

A. That is true.

Q. (By Mr. Henke): What was that point?

A. Steep Island.

Q. What did you anticipate that the Roustabout would do at that point?

A. That she would go to her own right.

A. That would be your impression of the normal procedure in coming down that channel?

A. It would. [170]

Q. Would she give any signal at that time?

A. No, sir.

Q. Normally, in following the channel in either direction, vessels do not give signals there, do they?

A. I didn't get that.

Mr. Long: I object to that unless it is indicated whether it is another vessel in sight of each other.

(Testimony of Captain George William Rose.)

Signals are not required unless vessels are in sight of each other.

The Court: Does your question contemplate——

Mr. Long: Whether vessels are in sight of each other.

Mr. Henke: I just asked the general question of whether it is customary to give signals.

The Court: The objection will be sustained. I can't see any sense in giving signals if there is no other ship in sight.

A. He wouldn't give any signal unless he had seen me; and he admitted that he didn't see me.

Q. (By Mr. Henke): When you first sighted the Roustabout, where was it in relation to your vessel?

A. Well, he was three miles or more away northward in the channel. I was going north and he was coming [171] south. I was bucking a flood tide; he was coming with the flood tide. He was coming very rapidly. I was moving over the ground very slowly. We were both on the right-hand side of the channel. When I saw him, I expected that he would go to his right, which he did not do.

Q. What direction was his vessel moving in relation to yours?

A. Well, I should say he was about three or four points off my bow, coming toward me.

Mr. Long: Which bow, port or starboard?

The Witness: Port—the left-hand side of the ship.

(Testimony of Captain George William Rose.)

Q. (By Mr. Henke): You took what action then; what did you do then?

A. Then I proceeded on my course, and when I saw that his lights had changed their range and if he continued on that course that he would jeopardize me, I turned to the right.

Q. You turned to the right. What did you do after you turned to the right?

A. I opened up his port light, shut out his green light, I steadied my ship and proceeded north on my course of 312 degrees. [172]

Q. I believe you gave a whistle signal at that time? A. No.

Q. No.

A. Then his green light came into view again which meant danger for me. Then I told my Quartermaster, "Put the wheel hard a'port," and at the same time I reached up and blew one blast of the whistle.

Q. How far away was he at that time?

A. Oh, I judge a mile and a half or a mile—between a mile and a mile and a half.

Mr. Henke: That is all.

Redirect Examination

By Mr. Long:

Q. Captain, I just want to clear up one thing, which we so frequently have with you men who went to sea fifty years ago. You mentioned a while ago that you told your helmsman "Hard a'port" in order to direct the ship's head to the right?

(Testimony of Captain George William Rose.)

A. Did I say "hard a'port?"

Q. That is what you said; that is what you said fifty years ago? A. I meant hard right.

Q. Hard a'port is an old order?

A. That is out of date. [173]

Q. When you said "hard a'port" did you mean hard right? A. Hard right.

Mr. Long: All right. That is all, Captain.

Mr. Henke: That is all.

The Court: You may be excused, Captain.

(Witness excused.)

Mr. Long: That is our testimony, your Honor, with the exception of the stipulation as to damages. I think we might agree upon that if your Honor would give us about a 5-minute recess. ..

The Court: We will take a short recess. That is the stipulation which was mentioned at the outset, is it not?

Mr. Long: That is right. It will save all of the detail of proving each thing.

The Court: All right.

Court will be in recess.

(Short recess.)

Mr. Long: May it please the Court, the parties and their counsel have agreed upon the former stipulation as to the items of loss under the policy, assuming the policy covers, and we shall reduce that to writing during the noon hour and file it directly [174] after lunch as evidence in the case.

Reserving the right to file our stipulation as to the amount of the loss, **Libelants rest.**

The Court: You close your case with that exception?

Mr. Long: With that exception, your Honor.

The Court: You may now begin the presentation of your case.

Mr. Menke: Will you take the stand, please.

MARVIN S. BEASLEY

called as a witness by and on behalf of the Respondent, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Henke:

Q. What is your occupation, Mr. Beasley?

A. Chief Boatswain's Mate, United States Navy.

Q. You reside where?

A. Bremerton, Washington.

Q. In May, 1942, what occupation were you engaged in?

A. I was a seaman aboard the USS Roustabout.

Q. That is the vessel which has been referred to in these proceedings, is that right? [175]

A. Yes, sir.

Q. Were you aboard that vessel at the time of her collision with the Eastern Prince?

A. I was.

Q. How long did you serve aboard the Roustabout?

(Testimony of Marvin S. Beasley.)

A Approximately four years and three months.

Q During that period she was operating from Seattle to Sitka and various points in Alaska?

A Yes, sir.

Q What type of vessel was the Roustabout?

A The Navy classification was "Yard Oiler."

Mr. Long: "YO"?

The Witness: "YO"; yes, sir.

Q. (By Mr. Henke): What classification is that; what type of vessel is that supposed to be?

A. Strictly a district craft, operating in the 13th Naval District.

Q. That is as opposed to a tanker which would be used for off-shore work or going with the fleet or something of that kind?

Mr. Long: I think the witness should give the testimony.

Mr. Henke: I will reframe that.

Q. (By Mr. Henke): Will you distinguish it from other [176] vessels?

A. That vessel is for small tankers operating in off-shore activities to and from shore bases in distinction from fleet classifications such as "AO" or other designations which the Navy has.

Q. What was the character of the cargo which the Roustabout normally carried on her voyages?

A. Primarily fuel oil, Diesel oil, aviation gasoline, ordnance material, and general cargo.

Q. What facilities did she have for carrying general cargo?

(Testimony of Marvin S. Beasley.)

A. She was equipped with cargo booms to handle general cargo and a 2-deck hold.

Q. Why type of dry cargo did you normally carry on your voyages northbound?

A. General cargo; that is all I can state, including everything.

Q. Furniture? A. Furniture.

Q. Food products?

A. Automobiles, food products, ship's service material, clothing, anything should would take aboard.

Q. Southbound, of course, you returned light, did you not? A. Yes, sir.

Q. What type of cargo did you bring back with you in the [177] way of dry cargo?

A. Material that needed repair or any material the Navy deemed salvagable.

Q. Referring to the date upon which the collision occurred between the Roustabout and the Eastern Prince, what duty were you performing aboard the vessel at that time?

A. I was on watch as the bow lookout.

Q. As bow lookout, did you observe any other vessels in the channel ahead of the Roustabout?

A. Yes, sir.

Q. What were the nature of those vessels?

A. Fishing vessels and numerous small craft.

Q. Were there very many of those craft?

A. Yes, sir; very many.

Q. Did you observe the Eastern Prince as it was

(Testimony of Marvin S. Beasley.)

approached by the Roustabout? A. Yes, sir.

Q. Could you state the nature of the lights which you observed upon the Eastern Prince at that time?

A. Only white lights were visible until the ship was too close for safe navigation.

Mr. Long: I move that the latter portion of the answer be stricken, your Honor. The question was "What lights did he observe?" [178]

The Court: The latter part may go out.

Q. (By Mr. Henke): From your observation of the Eastern Prince, as you approached her, what conclusion had you reached as to whether she was going north or south?

A. Well, that I can't answer. I assumed she was going in the same direction we were, which was southbound.

Q. While you were observing the vessel at these times, could you see the red and green lights upon the vessel? A. Will you state that again?

Q. I say when you were observing the vessel as you approached it prior to the time that you realized there was any peril involved, were you able to observe the red and green lights upon the Eastern Prince? A. No, sir.

Q. All that you could see was white lights?

A. Yes, sir.

Q. When did you observe any of the red or green lights of the Eastern Prince?

(Testimony of Marvin S. Beasley.)

A. I can't answer that with any degree of accuracy.

Q. Did you pick up her running lights before they picked them up on the bridge, or would you say they were conscious of it on the bridge before you were?

Mr. Long: Just a moment. I have to object to that. I don't see how this witness out on the bow of the ship at night knows what was going on in somebody's mind on the bridge. I think that is too speculative. He can say what he did or what he saw.

Mr. Henke: Strike that question.

Q. (By Mr. Henke): What did you do when you observed the navigating lights, the running lights of the Eastern Prince?

A. Well, in the capacity of bow lookout I knew the Captain was fully aware.

The Court: I couldn't quite hear you.

A. (Continuing): In the capacity of bow lookout, I knew the skipper was fully aware of the danger. My capacity did not involve giving any orders, so I was at a loss to take any action whatever.

Q. As bow lookout, you would have notified the bridge if you had observed the vessel was in peril, would you not?

A. That is correct.

Q. What are the duties of the bow lookout?

A. To watch for dangers to the ship such as

(Testimony of Marvin S. Beasley.)

floating logs and to warn the commanding officer of any danger.

Q. Let me ask you this question: What was the relation [180] of the two vessels when you first became conscious of the fact that the Eastern Prince was going in the opposite direction from the Roustabout?

A. Well, we were coming on a collision course.

Q. When you became conscious of that fact, had there been any change in the course of your own vessel?

Mr. Long: I object to that unless the witness indicates that he knows. I submit the lookout on the bow wouldn't know anything about the vessel's course. I object to it unless he shows qualification to know what the vessel's course was and what changes were made.

The Court: The objection is sustained. See if you can lay a foundation.

Will you read the question?

(Last question repeated by the reporter.)

The Court: Aren't you assuming a fact not in evidence?

Mr. Henke: I am just asking him if he was conscious of a change in the course of his own vessel.

The Court: Read the question again, Mr. Reporter.

(Last question repeated by the reporter.)

The Court: The ruling will be vacated. The

(Testimony of Marvin S. Beasley.)

objection is overruled. You may answer the question. A. That I do not know.

Q. (By Mr. Henke): Was there any change in the course subsequent thereto? A. Yes, sir.

Q. What was the nature of that action?

A. My recollection is the ship Roustabout turned hard to port.

Mr. Long: To the left—to her left?

The Witness: To the left; yes, sir.

Q. (By Mr. Henke): What interval of time would you say there was between that action on the part of the Roustabout and her own becoming conscious that the Eastern Prince was moving in a direction opposite to the Roustabout?

A. That I can't say.

Q. Would it be a matter of minutes or seconds?

Mr. Long: I think the witness says he can't say.

Q. (By Mr. Henke): Mr. Beasley, will you tell me the position [182] of the Roustabout as to her height out of the water at the time of the accident?

A. The ship was on light draft, unloaded, with water in two tanks for ballast, I believe. Her bridge was approximately thirty feet above the water. My position was approximately twenty feet above the water.

Q. What would be your position in respect to the Eastern Prince; would she be on the level with you or would you be looking down at her?

A. We would be looking down at her.

Q. As you observed her, as you approached,

(Testimony of Marvin S. Beasley.)

could you say how many lights you saw upon her or give some estimate as to that?

A. I would say there were at least half a dozen white deck lights burning on the Eastern Prince.

Q. As I understand it, you saw no other lights?

A. No, sir.

Mr. Henke: You may take the witness.

Cross-Examination

By Mr. Long:

Q. Mr. Beasley, as I understand, you are presently a Boatswain's Mate, is that right?

A. Yes, sir. [183]

Q. In what department or service of Bremer-
ton? A. The Administrative Department.

Q. What are your duties now?

A. Acting as Yard Operations Officer.

Q. Yard Operations Officer? A. Yes.

Q. Keeping the records and that sort of thing?

A. Keeping the movements of the Navy Yard under operational control.

Q. When did you join the Navy, sir; prior or during the war? A. November of 1940.

Q. What was your work prior to that?

A. I was a college student.

Q. When did you join the Roustabout as a member of her crew? A. In June of 1941.

Q. You were a regular enlisted man, were you not? A. Yes, sir.

Q. And the Roustabout's Commander and Offi-

(Testimony of Marvin S. Beasley.)

cers were Officers in the United States Navy?

A. Yes, sir.

Q. And her crew was composed of enlisted personnel of the Navy? A. Yes, sir. [184]

Q. She was a duly commissioned vessel of the United States Navy in May of 1942, was she not?

A. Yes, sir.

Q. And during that period she was engaged in a shuttle run between bases here in Seattle—Naval Bases—and bases in Alaska? A. Yes, sir.

Q. Carrying petroleum products to those bases in Alaska northbound and carrying back whatever was to be carried back, as you have mentioned, southbound? A. Yes, sir.

Q. And her southbound trips included, as I have noted here, material for repair. Would that be Navy material such as damaged planes and other equipment of the Navy?

A. Navy and Coast Guard, both.

Q. Navy and Coast Guard? A. Yes, sir.

Q. I noticed, also, you indicated on her northbound voyage, in addition to the petroleum products, she carried ordnance material. What do you mean by ordnance material?

A. We carried small arms ammunition; also anti-aircraft ammunition. At various times we did handle dynamite for construction work by the CB's.

Q. That is a branch of the Navy?

A. Yes, sir; and also some torpedoes.

Q. For use in submarines?

(Testimony of Marvin S. Beasley.)

A. I assume they were, either submarines or aircraft torpedoes; not being familiar, I wouldn't say.

Q. You also carried some aerial bombs in your dry cargo hold, northbound? A. Yes, sir.

Q. You also mentioned on your southbound trips you carried salvageable material for the Navy? Just what do you mean by that?

A. We brought back air bottles, oxygen tanks, for the Coast Guard activities. We brought back planes that had minor damage.

Q. What kind of planes?

A. Observation planes.

Q. Navy, Coast Guard? A. Navy.

Q. Navy.

A. And the rest of the cargo was comprised usually of excess materials that we had taken north and they were unable to use.

Q. Did you bring back some defective ammunition from time to time? A. Yes, sir. [186]

Q. The cargo of petroleum products and ordnance materials you picked up where at Seattle—at Pier 91 or other stations here in Seattle?

A. In this area, yes, sir.

Q. And you delivered them to Sitka and other bases in Alaska? A. Yes, sir.

Q. Were those active Naval Bases at that time in May of '42? A. Yes, sir.

Q. Were there patrols being made by air and

(Testimony of Marvin S. Beasley.)

surface craft out of those bases at that time searching for enemy submarines and aircraft?

A. To my knowledge, yes.

Q. And the petroleum products, including aviation gas, that you carried on the Roustabout north-bound, were used in those planes and vessels, were they not? A. Yes, sir.

Q. As I understand your testimony, Mr. Beasley, you were the lookout on the bow of the Roustabout on the evening or early morning at the time of this collision, is that correct, sir?

A. That is correct.

Q. What means of communication did you have from your lookout station on the bow to the bridge?

A. Voice communication.

Q. Voice communication? A. Yes, sir.

Q. Did you have a bell to ring?

A. Not under those circumstances; no, sir.

Q. Well, did you have a signal bell up there to signal the bridge?

A. We have an anchor bell that was used when we anchored in fog.

Q. Don't you know as lookout the proper bells to strike when you see an object over your port or starboard bow or dead ahead, to notify the bridge?

A. No, sir; at this time I do not. I have forgotten.

Q. When you saw the red light of the Eastern Prince—and you did see it prior to the collision,

(Testimony of Marvin S. Beasley.)

didn't you? A. Yes, sir.

Q. You took no action whatsoever; I wrote down your answer. Is that correct?

A. That is right.

Q. Then you say the course of the Roustabout was changed to port or to her left?

A. As I remember it, yes, sir.

Q. Was the Eastern Prince at the same time swinging to her—the Eastern Prince's—right?

A. Yes, sir. [188]

Q. So the course of the Roustabout was directed in an obvious collision position with the Eastern Prince; she was swinging to the right and you were swinging to the left, isn't that correct?

A. Well, that would be for the Commanding Officer of the ship to state.

Q. Well, did you see it? They came together, didn't they?

A. They came together, yes, sir.

Q. As lookout, you don't have anything to do with the actual navigation of the ship—the direction of her head or helm, do you, sir?

A. No, sir.

Mr. Long: I think that is all. Thank you.

Redirect Examination

By Mr. Henke:

Q. I believe you stated that you served on board the Roustabout for what period of time?

A. Over four years, sir.

Q. During that time, did you ever see any

(Testimony of Marvin S. Beasley.)

enemy naval vessels of any kind? A. No, sir.

Q. Did you ever see any enemy aircraft? [189]

A. No, sir.

Mr. Henke: That is all.

Recross-Examination

By Mr. Long:

Q. You had armament aboard the Roustabout, did you not, sir, in the form of guns?

A. Yes, sir.

Q. If you had sighted enemy submarines or aircraft, would you have used them?

A. Yes, sir.

Q. That is what they were there for, wasn't it?

A. Yes, sir.

Mr. Long: That is all.

Mr. Henke: That is all. Thank you.

The Court: May this witness be excused now?

Mr. Long: Yes, your Honor.

Mr. Henke: Yes.

The Court: You may be excused.

(Witness excused.)

Mr. Henke: I do not believe that we will offer any further testimony, your Honor. [190]

The Court: We will be in recess until 2:00 o'clock.

Mr. Long: All we will have then is the filing of the stipulation.

I presume your Honor will wish at least a brief argument on this subject.

The Court: Yes, I would like to hear your argument.

Mr. Henke: We would desire from the nature of this case—it is rather complicated—the privilege of submitting a written brief to your Honor.

I was just wondering if we could submit *it* written briefs rather than burden the Court with further argument.

Mr. Long: That of course is a matter as to the Court's desires in the matter. I thought we might be a little helpful to the Court on the question of navigation, here. I think the strictly war risk question is well outlined and carefully prepared in the briefs, but I thought that a brief resume might be helpful to the Court—whatever the Court wishes in that regard. I think probably our arguments of five minutes to a side might be helpful.

The Court: I would like to hear your arguments. [191]

Mr. Henke: Very good.

The Court: Court is recessed then until 2:00 o'clock.

(At 11:45 a.m., Thursday, July 17, 1947, proceedings recessed until 2:00 p.m., on the same day in the United States Court House.)

Seattle, Washington

July 17th, 1947, 2:00 p.m.

(All parties present as before.)

The Court: What is the situation now in regard to this case?

Mr. Long: I stated before lunch, your Honor,

that we would reach a written stipulation concerning the facts as to the Libelants' loss claimed to be due under the policy. We did reach that stipulation which I would like to file and make a part of the evidence in the case.

Attached to the original Libel, your Honor, is what is known as a Statement of General and Particular Average. It is a bound document which is incorporated in this stipulation and which it is admitted may be admitted in evidence as Libelants' Exhibit Number 5.

I would like permission to detach it from the original Libel and file it as an exhibit.

(State of General and Particular Average re SS Eastern Prince marked Libelants' Exhibit 5 for identification.) [193]

Mr. Long: In accordance with the written stipulation referred to, I should like to offer in evidence Libelants' Exhibit Number 5, being the Statement of General and Particular Average in the case of the Eastern Prince referred to in this stipulation.

The Court: It may be admitted in evidence.

You have no objection?

Mr. Henke: No; subject to the statements contained in the stipulation filed with the Court.

(Libelants' Exhibit 5 received in evidence.)

Mr. Long: Libelants' Exhibit 5, now in evidence, is the document referred to in the Libel and Amended Libel as Exhibit "B" to the Libel and Amended Libel. They are the same documents.

The allegation of paragraph 5 of the Amended Libel reads as follows:

“That there is due and owing to Libelants from Respondent on said policy of insurance the sum of \$11,031.29, all as more fully appears on said Exhibit ‘B’—which is now Exhibit ‘5’—and although demand accompanies by the submission of said Exhibit ‘B’ was heretofore made on respondent [194] for payment on the 11th day of September, 1942, respondent has refused to pay the same.”

The answer to that Article of the Amended Libel made by respondents is as follows:

“Answering paragraph V of said Amended Libel, the respondent denies the same and each and every part thereof except that respondent admits that demand was made for payment as therein recited and that said payment was refused by respondent, and particularly denies that the respondent is indebted to the libelants or any of them in the sum of \$11,031.29 or in any sum whatsoever.”

I wanted to make those recitations for the record so that we could tie it with this exhibit.

With the filing of that stipulation and the exhibit, your Honor, the libelant now formally rests.

The Court: Do you have any further testimony?

Mr. Henke: No, we have no further testimony to offer to your Honor.

In respect to the argument of the case, as I understand we present oral argument, but we would [195] desire the privilege of submitting a written brief to your Honor, in view of the complications

of the questions submitted. I would like to have that privilege.

Mr. Long: I was going to suggest, your Honor, that we have this record written up and transcribed for the Court's use if so desired. We would be perfectly willing to stand half of the cost for so doing.

The Court: Counsel would desire to submit authorities?

Mr. Henke: Yes; we would desire to submit a brief if we may, your Honor.

The Court: How much time would you like to have?

Mr. Henke: Did you desire to submit a brief?

Mr. Long: I think the matter has been quite thoroughly covered by rather voluminous briefs now on file. If you wish to submit a brief, of course, we would have no objection whatever. We would like to have an opportunity to respond to it is all.

The Court: Is your intention based upon the mistaken premises of Judge Bowen here as to the direction the ships were going?

Mr. Henke: Judge Bowen's opinion was merely [196] passing upon the general allegation of their libel as we view it. In view of the introduction of the testimony in the case, we believe the matter should again be reviewed and we would desire again to submit the detailed law upon this subject of war risk insurance; particularly as it applies in this particular case.

Mr. Long: Responding directly to your Honor's question, we don't regard it as being material which direction the ship was going in this shuttle service. I think the cases will bear us out in that contention.

Mr. Henke: I probably didn't answer your Honor correctly, there. Counsel, of course, has used this term "shuttle service" which was introduced by their witnesses, which is a term used in the settlement agreement, which is referred to in our brief and of which we will furnish your Honor with a copy.

I think that that is a factor; the fact that the vessel was returning to Seattle light is a factor to be considered in the light of these cases, unquestionably.

The Court: Other than that, if Judge Bowen's opinion is the law of the case, I am not disposed to go behind it. [197]

Mr. Henke: We would not desire to be left in that position if we could avoid it. That is, we desire to submit the whole question so that it might be fully reviewed.

The Court: At the outset, it was stated, I believe, by Mr. Long and I got the idea that you agreed, that the contentions here were, first, whether or not the Steamship Roustabout was engaged in warlike operations. Isn't that the contention?

Mr. Henke: That is one of the questions, yes.

The Court: That is one of the questions. And then, if so, did this collision result from fault in any degree on the part of the Roustabout?

Mr. Long: That is correct, your Honor.

The Court: So that if the collision resulted from some degree of fault on the part of the Roustabout, and the Roustabout was engaged in warlike operations, the determination of those two questions determines the case?

Mr. Long: That is correct, your Honor.

Mr. Henke: I believe that is correct, your Honor.

The Court: Unless there is some contention made or some authorities to be submitted that the Roustabout turned around and was going the other way, [198] as thought by Judge Bowen, would make any difference in the case, I am ready to make finding.

Mr. Henke: If your Honor please, I think there is no question about that. That is one reason I wanted the privilege of submitting these authorities in detail to your Honor. The question is a very complicated one.

The Court: If the ship Roustabout was engaged about this time—the term is stated here, “In warlike operations,”—and it was a warlike operation making a trip from Seattle, loaded with the different kinds of petroleum or classes of oil and gasoline, and then on the way back came back in ballast, even if she didn’t have anything on board coming back, if she came back here with the purpose of resuming and taking on another cargo here, it seems to me it would be just as much a warlike operation in one direction as the other.

Mr. Long: That is it.

Mr. Henke: In the first place, I don’t think

that the vessel should be considered as being in war-like operation or one which brings it within war-risk. That is the reason I would like to have the privilege of submitting a brief upon the subject so that we may make our position clear. [199]

Mr. Long: I think we might devote ourselves in our oral argument to just that point, your Honor, that your Honor has in mind—the question of war risk rather than touching on the navigation aspects of it.

The Court: On the question of war risk, I have read Judge Bowen's decision. It seems to me that if there is any meaning to this phrase that we have heard so many times, "the law of this case," this certainly would be the law of this case unless the mere fact that we had the vessels turned around would make any difference and I can't see where it would make a difference. So I think that is the law of this case—Judge Bowen's decision is the law of this case. I am not inclined to consider going in behind it.

Unless you have something to offer that would destroy the force of his opinion by virtue of the mere fact that he considered the ship's going from Seattle to the Alaskan bases rather than from Alaska to Seattle, I am going to make findings now.

Mr. Henke: I would request the privilege, your Honor of submitting a brief. I cannot, of course, go beyond that.

The Court: I really don't see any need of it, [200] as far as I am concerned. So unless you

want to address your argument to this one point, I am ready to make some finding.

Mr. Henke: Do I understand that your Honor, then, that you do not wish to have even an oral argument?

The Court: Unless you want to argue on this one point. There is no use in arguing—you are wasting your time to argue any questions of law that would be contrary to the views expressed by Judge Bowen. I am going to accept his ruling as the law of the case. Only in the event that we had the ships going the other way would make some difference in the law; and I don't see how it could.

However, I am not going to restrict you from oral argument on any point. But I will be hard to convince on any point contrary to Judge Bowen's decision. I will put it that way. But if you want to argue on any other point, you may do so.

Mr. Henke: If your Honor please, you will recall that Judge Bowen's decision was not passing upon the facts of the case but was passing upon the allegations of the libel, itself. That portion of the libel which Judge Bowen was passing upon—

The Court: Well, isn't that set forth in [201] paragraph 1 on lines 24 to 30, page 1, and then on page 6, from line 7? I had in mind findings along these lines: That at the time involved here the Roustabout was officered, manned, and operated by the United States Navy and was proceeding between Alaska war bases and Seattle, either with a cargo such as was mentioned as the usual cargo carried from Alaska bases to Seattle or without cargo com-

ing to Seattle for the purpose of taking on a cargo of fuel oil, gasoline and other petroleum products for use by naval vessels and aircraft of the United States in the prosecution of the war with Japan. I have in mind making such findings as a result of my views of the evidence that I have heard here. I get the point you just made here.

The findings Judge Bowen has assumed, as shown by the Libel, except as to the direction the ship was heading, would be found as facts by me at this time.

Mr. Henke: Do I assume also that you would make findings that the Roustabout was at fault?

The Court: Partly at fault.

Mr. Long: Your Honor, there was a finding of mutual fault of both vessels?

The Court: Mutual fault. [202]

Mr. Henke: If your Honor please, the reason that I asked for the privilege of submitting the brief was that I was fearful that your Honor would just on a casual reading of Judge Bowen's opinion, and considering the evidence, probably come to the point that you have. It seems to me that only by a consideration of these authorities in detail can you come to an appreciation of the question of war risk.

Circumstances of the present case—of course, the mere fact that the Roustabout was operated by the Navy is no justification for concluding that she was a warship and subject to making this a war-like operation. When Judge Bowen made his decision, of course, he was giving the libelant the

benefit of the doubt and taking the circumstances as recited in the libel that this vessel was engaged—

The Court: I won't shut you out from compiling a brief if you want to; and if you can cite some authorities or by argument convince me that the statements that I have made here are incorrect, I will backtrack very readily.

Mr. Henke: I would like to have that privilege.

The Court: You may. [203]

Mr. Henke: I wonder if we might have two weeks within which to submit that, if that is agreeable to Counsel?

Mr. Morrow: May it please the Court, at this time we would like to make a very short oral argument upon the point requested by the Court.

Mr. Long: We have no objection to the submission of a brief, your Honor, at all, if we have the privilege of responding to it.

The Court: Twenty and ten, is that all right?

Mr. Long: That is very good.

Mr. Henke: Yes, sir.

The Court: All right.

Mr. Long: Thank you.

(Whereupon Argument was delivered by Counsel for the respective parties.)

(At 4:10 p.m., Thursday, July 17th, 1947, the taking of evidence having been concluded, the case was taken under advisement by the Court.)

(Concluded.) [204]

CERTIFICATE

I, Merritt G. Dyer, Official Reporter, United States District Court, hereby certify that I reported all of the proceedings in the foregoing case and that the transcript thereof is a full true, and correct statement of the proceedings occurring therein.

/s/ MERRITT G. DYER,
Official Court Reporter.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington

July 16-17, 1947

FINAL ORAL ARGUMENTS

Mr. Morrow: May it please the Court, the basis of Judge Bowen's decision, namely, that the USS Roustabout was a war vessel engaged in naval service, having aboard her United States Navy officers and personnel, and coming into collision with another vessel by reason of fault of the USS Roustabout, would appear to be conclusive of the law of the subject.

The probable contention of the respondent that the direction in which the Roustabout was going at the time, namely, from Alaskan war bases to war bases in the United States makes a difference—

The Court: Pardon me, before we forget it. The thought that you had of having the transcript made is still in effect, is it, in view of the—

Mr. Long: I am quite willing to do so, yes, your Honor.

Mr. Henke: Yes, your Honor.

Mr. Long: We will share the expense of it.

The Court: All right. The arguments of counsel and the transcript of the testimony?

Mr. Long: Yes, your Honor.

Mr. Henke: Yes.

Mr. Morrow: I direct the Court's attention to the extensive brief, the original brief filed by [205] libelants on page 10 thereof, referring to the *Worilda*, entitled the *Adelide Steamship Company, Ltd.*, vs. *The Crown*, 14 *Lloyds Law Reports*, page 549. In that case the *Worilda* was a vessel requisitioned by the British Government and used as an Army hospital ship. She was on her way—return I should say—from forward war bases at Havre, France to Southampton, England, when the collision occurred. She had aboard her, at the time—being a hospital ship—wounded men, doctors, nurses. She collided with another ship, a merchant vessel, which was carrying general cargo. The *Worilda*—the quasi war ship, we will call it—was at fault and the Court held therein that the damage to the *Worilda* was a consequence of the warlike operation as was the damage to the other vessel. That is a case of the vessel returning. The other cases, one is a companion case—that is, two cases set forth in one report—involve the *Tartar* which was a destroyer on submarine duty, when in collision with another vessel at the turn of her beat of patrol—momentarily as it were not doing patrol

duty—but on the turn of her beat she came into collision with another vessel. The damage to the other vessel was held to be a consequence of a warlike operation. [206]

Those cases are likewise reported in our brief and are referred to in Judge Bowen's decision—referred to therein as the *Tartar*.

The companion case in that report, which isn't mentioned by Judge Bowen, is much of the same nature. It refers to His Majesty's Ship, the *Devonshire* which was going to convoy duty. She was not at the time strictly engaged in what you might say enemy activity, but she was engaged in her duty as a war vessel. And where collision occurred they held that it was a consequence of a warlike operation.

The most significant case, perhaps, and the main basis upon which Judge Bowen made his decision, was the *Travonian-Roanoak*, referred to by citation as the *Board of Trade vs. Haines Steamship Company*. That case involved a United States Naval Mine layer. She was returning to the United States after the Armistice was signed, after hostilities had ceased anyway. And while in, you might say, American waters came into contact—collision with an American vessel. The damage to the other vessel was held a consequence of the warlike operation. In view of the Court's indication in this case, I don't intend to labor the matter but I would like to quote some of the important statements of the [207] House of Lords in that case which indicates the position that the Court would take in any case

where a war vessel is engaged in her service in time of war; that that in itself is a warlike operation. And a collision resulting from the fault of a vessel engaged in a warlike operation—or where it is mutual fault as in the Roanoak and the Travanion—there can be no doubt that the damage so caused to either vessel is the consequence of a warlike operation.

It is very interesting that the findings of the arbitrator in the Travanion-Roanoak case are substantially what the Court has indicated the findings would be in this case. The findings of the Arbitrator in the Roanoak case were as follows:

“That the Steamship Roanoak”—which was a war vessel—“at the time in question was in possession and control of the United States of America, under bare boat charter during the period from the 25th of June, 1918, to the 25th of January, 1919. She was employed by the United States of America solely for Naval purposes as a regularly commissioned mine planter of the United States Navy, operated by the Navy Department, officered by commissioned [208] officers of the United States Navy and manned by a United States Navy crew. At the time of the collision with the Travanion the Roanoak, under her aforesaid public employment and officered and manned as above, was proceeding from Falkland to Virginia in the United States, the 700 mines aboard belonging to the Navy Department of the United States of America, and was carrying no other cargo and no passengers. She

was exhibiting regulation lights. There was no evidence before me as to the circumstances under or the purposes for which the mines in question were being carried.

“Having carefully considered the evidences of said collision, I find that it was caused by the negligent navigation of both vessels and that both were equally to blame. The said negligence consisted in a bad lookout on both, insufficient parting by the Travanton and failure to keep her course on the part of the Roanoak.”

It is plain that the Arbitrator held that the Roanoak, the same as an auxiliary vessel in this case, [209] was a war vessel. And collision with another vessel constituted a collision in consequence of a warlike operation.

Lord Warrington’s reasoning on this case is stated as follows:

“Hostilities were suspended but the war was not at an end. In my opinion it was open to the Arbitrator to hold that notwithstanding the suspension of hostilities, the voyage of the Roanoak under the circumstances found by him was a warlike operation. The Arbitrator has found that during the period—including the day of the collision—the Roanoak was employed solely for naval purposes as a regularly commissioned mine planter, carrying a large cargo of mines. In a state of war that fact is in my opinion enough to constitute her voyage a warlike operation.”

And it certainly pleases me that the Court, not

even reading this decision or this language has come to the same conclusion in regard to the Roustabout; that she, too, like the Roanoak, was a United States naval vessel about her service in time of war with commissioned officers aboard in charge and [210] enlisted personnel. It really makes no difference what she was carrying.

This is Count Sumner's reasoning:

"The appellant's proposition is that it was not enough to prove what the Roanoak was unless it was also shown what she was doing. I recognize the high importance of considering the ship's errand and the purpose of her voyage but I should have thought that, having proved an animal at large to be a lion, it was not further indispensable to prove that he was not at the moment merely performing like a lamb, unless, of course, some circumstance of bovine behavior happened to be apparent.

"We have no right in law or in fact to assume without evidence that such a ship is not engaged on the duty or the service for which she forms part of the Navy to which she belongs. The mere fact we do not know why she was sailing away from the area of hostilities for purposes unknown does not establish such conclusion."

And so forth.

Lord Warrington—the emphasis to be placed upon the basis of his decision is that the Roanoak was employed solely for naval purposes as a regularly commissioned mine planter carrying a large cargo of mines.

“In a state of war” he says “that fact is in my opinion enough to constitute here a warlike operation.”

So we have at least three cases during the first war really; the hospital ship which was returning to base in the First World War; we have the Travonian decision where hostilities had ceased and she was in American waters on her way to Virginia; and we have the two cases set forth in one opinion—that of the Tartar, the submarine, turning on her beat and coming into collision. We have His Majesty’s Ship, the Devonshire, which was going to a convoy. Those cases are certainly sufficient, in my opinion, and certainly in Mr. Long’s opinion, to meet this contention or any possible contention that the direction in which the ship is going at the time makes any difference as long as she is performing the naval duties for which she was intended in time of war.

One minute’s discussion on the developments of the law since Judge Bowen’s decision, if the Court [212] please. Since that time and right on the same point, too, we have had a case—which is cited in our trial memorandum—involving a tanker, a commercial tanker, not a naval ship at all; and she is carrying a cargo of oil to war bases. Under the cargo carried theory adopted in the Coxwell case she was, ipso facto, a war vessel. Under the Umbrella theory of causation adopted in the Coxwell case, anything that she might do in the course of her warlike operation was a consequence of a war-

like operation. The vessel on this occasion had left a war base of supply and was moving to another war base to distribute the oil. She came to anchor during the evening and was placed there by a patrol boat. The patrol boat left her, and during the night, why, she pulled anchor. She anchored again and the next morning it was found that she had pulled anchor and that she had stranded and caused damage to her bottom.

The court held in that case that the damage was a consequence of a warlike operation. There we have, again, a temporary suspension of any movement with respect to the war. But it just illustrates how far the courts have gone on determining what is a warlike operation within the terms of a free and [213] capture warranty of a marine policy.

There is one other point I would like to speak about with the permission of the court with respect to Judge Bowen's decision, and that is also on the matter of causation.

The Court will recall, in reading his decision, that Judge Bowen based it upon the Queen Insurance Company case. Following our briefs upon the subject, he decided that Justice Holmes' reasoning in the Queen Insurance Company case, that there was an important reason to keep in harmony with the British law on the subject of marine insurance. That was paramount in Justice Holmes' reasoning that the cause of the loss should be that cause which is nearest to the loss.

So that Judge Bowen, following Justice Holmes' paramount reasoning, followed the Travaniion-Roanoak case and took a white cow case out of the bag and said, "This is it." But I want to point out to the Court that in our supplemental brief on this question to Judge Bowen, we discussed the question of causation, and in view of counsel's trial memorandum referring to the Standard Oil case, where the court adopts language from the Queen Insurance case, "That [214] in the matter of causation we will look to the cause nearest the loss"—in view of that I wish to point out to the Court the fallacy of the reasoning in the District Court in New York. That theory of causation was abandoned in the Leland Shipping Company case, an English case. This is all contained in our supplemental brief.

In the Leland Shipping Company case they abandoned the theory of causation—that it is the cause nearest the loss—and said that it is the efficient cause, the direct cause.

It is interesting to note that in the Lanza Fruits Steamship and Importing Company vs. Universal Insurance Company, 302 U. S. 556, the United States Supreme Court adopted the theory of causation set forth in the Leland Shipping Company case and stated, "It is true that the doctrine of proximate causation is applied strictly in cases of marine insurance but in that class of cases, as well as in others, the proximate cause is the efficient cause

and not merely the incidental cause which may be near in time to the result.”

So I say this: that if the Court has occasion to write a decision in this matter, which certainly is an important matter and which would be welcomed by the [215] shipping industry and the great field of marine insurance, that if the Court desires he may clarify the decision of Judge Bowen in these two respects: first, that it makes no difference which direction the vessel was going; and secondly, that the matter of causation apparently intended to be followed by Judge Bowen was somewhat that of an umbrella theory adopted in the Coxwell case which is the leading case on the subject today. Also that the United States Supreme Court has adopted a theory of causation of the English court in the Leland Shipping Company case, that theory being that it is the efficient cause and not the cause nearest to the loss.

Mr. Henke: If your Honor please, this case from a standpoint of war risk is very startling in the sense that it is one of the few cases—only cases—that you can point to where a collision has occurred between two vessels under circumstances which are absolutely the identical peacetime circumstances under which those vessels would navigate, and it has been contended that it was a war risk loss.

The evidence in this case is uncontradicted [216] that both vessels were navigating with their regular navigating lights, that all navigating aids were

in full force and effect. They were following the so-called Inside Passage to Alaska in the manner it is regularly followed by all vessels which follow it today and which followed it before the war. There was no enemy action within that Inside Passage. The officers—the Captain of the Roustabout and the members of the crew who testified both testified that they never saw an enemy ship, they never saw an enemy plane, and they were there for a period of some four years; in the case of the last young man. I believe the Captain had served for a like period.

They were running this ship which was an old converted tanker. It was a tanker which comes under the classification of a yard oiler or small tanker used for servicing points around a Naval Base. It was not a vessel that went to sea. The Admiral admitted that it was a very slow ship. It had about half the speed of an ordinary Liberty ship—the type of Liberty ship which was built as an emergency ship on the basis of “build as much as you can.” The Liberty wasn’t designed as a particularly fast ship; it was a relatively slow ship. Yet this tanker has, as its maximum speed, half the speed of [217] the Liberty. Likewise, as the Admiral testified here today, a Liberty merchantman was more heavily armed than was this little vessel, the Roustabout.

Now, everything, so far as the entire background of this case, is absolutely the normal situation that you would find in peacetimes. That accident could

take place today under the same circumstances and without the effect of any claim or basis of claim of it being a war action. Counsel has in his argument, here, told the Court that it was proper to consider the statement of Judge Holmes in the Queen case, that it was desirable that the law of the United States and England correspond as much as possible on all questions of insurance, in view of England being a marine insurance market. He disregards the Queen case otherwise and says that the Queen case should not be considered further.

The Queen case is a collision case. The Queen case involves a claim for collision of the vessels known as the Nappaly and the Lymington which occurred during the last war. The Nappaly was a vessel loaded with war supplies proceeding in convoy to Italy. She was struck by the Lymington as she was coming out of the Mediterranean as the convoy she was with was going in. As a matter of fact, it [218] occurred as an error of the naval convoys in not advising one convoy that the other was coming. In that case the Supreme Court said that the primary cause was the failure of navigation of the two vessels. The Nappaly collided with the Lymington and that was a marine risk. Now, of course, that was a much stronger case so far as collision was concerned than is the case here.

In that case you have a vessel which is operating under entirely war conditions—lights out, proceeding in convoy, under the most difficult circumstances; and she comes into collision with another

vessel. That is the *Queen* case, a decision of the Supreme Court of the United States.

In this case, here, we have the simplest of circumstances. There cannot be pointed to one thing which is indicative of a war condition. The only thing that can be claimed as a war condition is that the *Roustabout* was carrying fuel oil from points in Seattle to Sitka, Alaska, for the Navy. Now consider that point if you will, which of course was not before Judge Bowen. He merely had the bald statement that she was engaged in a warlike operation carrying petroleum products between the naval bases.

The Admiral testified today that Sitka, where this vessel went to, was approximately 1100 miles from Dutch Harbor which was the only point which the Japanese undertook even to make one bombing raid on during the war; that it was approximately 2,000 miles away from Kiska and Attu, where the Japanese made a landing. That vessel in her entire journey shuttling back and forth, as counsel likes to use the word "shuttle" as it is used in the settlement agreement, was just going back and forth carrying petroleum and she was not at any time in a situation where you could point to her and say, "Here, this vessel is engaged in a warlike activity; she is in the war zone; she is operating under war conditions."

As far as this operation was concerned, the Standard Oil Company could have continued that same operation during the entire period of the war.

Instead of that, the Navy took it over and put this Roustabout under a Navy crew and had it perform the same functions.

There is no case Counsel can point to which justifies the situation of a tanker of this type returning empty to her base of supplies that would be considered in war operations. The only case involving a vessel which can be considered at all is this rather unusual Roanoak case which Counsel referred [220] to and which is the case in which there was an American minelayer with apparently a full load of mines which was returning from England and her operations there, which came in contact with a British vessel on her return voyage, which was shortly after the Armistice. She was over there in minelaying operations and the Armistice was signed and she was returning to the United States with her load of mines—returning to her base in this country. That case holds in effect that the Roanoak was at that time still engaged in a warlike operation with a load of mines aboard when she collided with the other vessel.

In this case, here, you have merely an empty oil tanker—not even a fleet tanker—just a pure yard oiler, probably as low as you can get in the line of tankers, returning to Seattle to load fuel again for a return to these bases in Alaska.

It is to be noted that, as the Admiral testified, these bases that they were serving were normal naval establishments from which patrols were maintained in just the same way as patrols were

maintained from Seattle, San Francisco, Los Angeles, and every other place, for the purpose of determining whether or not there was any enemy activity off the Coast.

Those circumstances all show the extreme conditions [221] which exist in this case which is claimed to be a war risk loss. The cases which Counsel referred to as the English cases are all clearly distinguishable from the situation which is before the court here. Counsel refers to the last English case having to do with the tanker which was damaged at an emergency naval base in Scotland. Now, there of course, is a question where war risk may properly be claimed. That vessel, with a load of fuel oil, was brought to Scotland by the British Government under requisition. She went to what was an emergency harbor, a special harbor arrangement which was established by the Royal Navy to take care of some of their emergency operations. She immediately passed under the control of a Royal Navy Harbor Master. He told her to anchor at a specific spot. They anchored at that specific spot. And it later developed that that was over a rock or reef which, while the vessel swung, resulted in her being grounded on this rock or reef and being substantially damaged.

The corresponding American case, which counsel says should be disregarded, is the case involving the Standard Oil Company vessel. Now, there, we have a vessel which was sent by the Standard Oil Company from the United States and ports in

Columbia to France [222] to deliver oil to a French subsidiary of the Standard Oil Company of New Jersey. When she arrived in France, she arrived in France about the time that France was falling and she went from one French port to another until finally she was directed by one of the naval vessels to proceed to Falmouth, an English port, to be unloaded. She arrived at Falmouth and when she arrived there, of course, the entrance to the harbor was mined. She wanted to secure her entrance, and she hoisted the international signal that she desired to enter and desired to have someone lead her in. A small British patrol vessel came along, and hoisted the signal "Follow me." They proceeded to follow this small English patrol vessel which apparently was attempting to lead her through the mines into the harbor. In the course of that journey into the harbor and through the mine field, the patrol vessel apparently was unacquainted with the amount of water that the American vessel drew and, as a result, put her on the rocks and she suffered substantial damage. In that case the Standard Oil Company made demand against the marine underwriters for loss. The marine underwriters said, "No, that is a war risk loss." Our court held, "No, that wasn't a war risk loss. This vessel was under no restraint. She suffered damage only by reason of [223] an ordinary fault of navigation." In other words, until you could show that the Navy had taken this vessel and forced her to follow this particular course, it still remained a

marine risk, indicative of the more liberal view, let us say, of the American courts.

In the present case we have the situation of a tanker—a tanker manned by a Navy crew. She is returning light. She has no more war cargo. She is now moving away from even the remote field of the war as far as we are concerned. She is in British Columbia waters. She is traveling with all of her navigation lights. The vessel with which she collides is traveling with all of her navigation lights. And under those circumstances the whole situation is such that it is an extreme stretch of the imagination to say that that is a war risk. That is a collision which could have occurred in normal peacetimes. It is a collision which could occur to-day and no one could point to any phase of it and say “That is an abnormality which could not exist today” or “That is an abnormality which could not exist except during the period of the war.”

Judge Bowen was passing upon the allegations of the liability and, of course, giving them the benefit of the doubt, as he was obligated to do, under the circumstances. There we have a tanker—without [224] a description of the tanker—moving to war bases in Alaska for all the world knows, moving right out into the combat area with the fleet, coming into collision under circumstances which might be extremely hazardous, and extremely like that of an ordinary war condition.

The circumstances were the vessels were traveling without lights. The circumstances were the

navigation aids were removed. The circumstances were the Roustabout could be said to be engaged in a substantial naval operation, a substantial naval movement.

Now, that isn't the situation here. The facts in this case show very clearly that the situation is extremely the other way around—that the conditions are absolutely normal. There is not a war-like item which contributes to this loss. And so the Queen case considered, and the other related cases considered, it is apparent that under the circumstances which the proof now shows, the plaintiff is not entitled to recover. If the plaintiff is entitled to recover in this case—is permitted to recover in this case—it will unquestionably be the most extreme war risk case which has ever been decided by the American or British courts. It will be a decision based entirely upon the theory that the vessel belonged to the Navy—if she is in [225] collision—and anything could be said to be negligent on the part of the Navy, then it is a war risk loss. That was certainly never the intent of the insurance company and it was certainly never the intent of the parties.

The recitals as contained in the War Settlement Agreement—a copy of which I anticipated having here for your Honor today but which I will see is properly submitted to you—do not go beyond this even under the settlement covering risk assumed under the old FC&S cause which this is. Immediately upon this question being raised, as it is

raised in this case here, this complete clause was rewritten. The War Shipping Administration taking over completely rewrote the clause to eliminate any possibility of a contention of this character being made. As the contracts are today, no contention of this kind could be made. That is of course shown by the agreement which is referred to and published in the American Maritime cases.

The whole contract of war risk has been changed to eliminate the possibility of a claim of this character being advanced—even claims related and similar to this. So that under the circumstances which exist here, there is no showing which justifies [226] a recovery on the part of the plaintiffs. Their loss was clearly a marine risk, clearly a risk which should be paid by the marine underwriters on the vessel. The marine underwriters assumed the responsibility for those damages which resulted in the normal navigation of vessels of this type. No one can say any phase of this case, as shown by the evidence, isn't normal. And to now take and say the war risk underwriters—the chaps who took the possibility of here being damaged by being torpedoed or enemy action or some similar loss—are now the ones to bear the loss of this ordinary collision between these two vessels is an extreme contention. I respectfully submit that after your Honor has considered the decisions which would be applicable here and applies them to the facts in this case that you will agree that this is not a war risk loss but is a marine loss which should be borne

by the marine underwriters and be put over on the war risk underwriters.

Your Honor indicates that it was your thought that the circumstances here show mutual fault. I would just like to say that the evidence here does show, I think quite clearly, that the Eastern Prince was moving with lights which were wholly improper. [227] The decisions generally are uniform——

The Court: Just a moment on that point. Your trial brief assumes that the lights were proper—that the navigation lights were proper on both boats. So isn't that out now—that question of——

Mr. Henke: No. My trial brief said the navigation aids having to do with the lights on the shore, and that the vessels were traveling under normal conditions where they were showing their regular lights; that is, there was no black-out in the sense that—in other words, most of these war risk cases, your Honor, occur in situations where vessels are traveling at night; for example, with their lights out in convoy where you have got maybe twenty-five or thirty vessels traveling without lights and by reason of that fact they collide with one another; or two convoys meet and, not having their lights, they collide with each other. But the point that we made in our brief was the conditions upon the inside passage as it existed at this time were normal; that is, they were conditions as they exist today, no different now than they were then. You had all of your lights and shore signals and no

buoys removed. No navigation aids were removed and the vessels traveling on the Inside Passage were all [228] traveling with their regular navigation lights.

The evidence here shows I think beyond question that the Eastern Prince was at fault in this instance in that she was exhibiting lights which were unauthorized. Her lights were in such a condition that the Master and crew of the Roustabout were thoroughly deceived as to what they were approaching. As the Captain of the Eastern Prince testified, he had four lights on the main deck under the boat deck, which were of equal power to the lamps which he had in his red and green running lights. Of course, those lights being colored would be less visible. And all that the crew of the Roustabout saw were these white lights. They couldn't recognize the red and green lights until the Captain of the Eastern Prince made this maneuver of his, when he turned his ship sharply towards the shore; and when he did that and brought the ship around sideways, then they could for the first time distinguish his running lights. But as far as the crew of the Roustabout were concerned, all they saw were a series of white lights.

As they testified, up in these waters that they were going through there were many fishing vessels up there. And when you look at the rear of one of these fishing vessels, you see practically the [229] same thing that they thought they saw, which was the one white light at the top of the mast, the white

light which fishing vessels show 360 degrees and several white lights down below which is typical of these fishing vessels at night—the white lights below being reflected out of the cabin of the fishing vessels.

The Eastern Prince there, of course, the failure to exhibit her proper lights and the exhibition of improper lights, which makes it even worse, thoroughly deceived the Roustabout as to what was approaching, so that the Master of the Roustabout and the crew figured, “Well, here is just another one of these fishing vessels which we will, of course, be obligated to swing around; we are overtaking it, we will swing around it.” And, of course, it was not until they were right on top of it and unable to protect themselves that the Master of the Eastern Prince threw his vessel hard over to the right and then they were able to determine that they were not overtaking a vessel but were now approaching one head on.

Under all of these circumstances, as shown there, I think there is not sufficient evidence here of any claim of negligence on the part of the [230] Roustabout so far as that accident was concerned.

The Court: You contend that there was no fault on the part of the Roustabout?

Mr. Henke: That is correct, sir. Her Master was thoroughly deceived. He acted reasonably in the light of what he understood the circumstances to be. I don't think that you can say that there is anything which is quite as deceptive and quite as negligent as to put a vessel in such circumstances

that the other vessels operating in the area, particularly in a narrow water of this type, cannot determine which way the vessel is going; they are deceived. It is sort of like a Studebaker automobile when he gets through; they formed the opinion that he was going the same direction they were. There is no question about these lights being exhibited. And, of course, these men that testified, that we had here, the Captain and the young Chief Boatswain, who testified today, they have no interest in the case one way or the other as far as they are concerned. Their testimony is largely disinterested.

And as the young man testified here today, he was standing in the bow of the Roustabout and watching this vessel, and he concluded that they were merely overtaking it and that it was merely another [231] fishing vessel, and all because of these improper lights. Under those circumstances, the Master of the Roustabout was thoroughly deceived. They say that he was—they raised the question of position in the channel, but naturally, opposite the Campbell River, he is going to attempt to protect that type of vessel from grounding. It is very difficult to say, "Now, you should be 'way over on the other side." Whereas, if you will recall the testimony of the young man who was the Quartermaster on the Eastern Prince, that it was a relative matter of a few minutes from the time of the collision that it took him to get over into Campbell River; so the Captain was correct in his analysis that he was off the Campbell River estuary where he was in some danger of grounding a vessel of the type of the

Roustabout. He acted reasonably. Of course, his assumption was that in moving through these waters with these small fishing vessels, it was his obligation to avoid them and he was attempting to do that. But, of course, the thing that threw him off completely was the fact that the Eastern Prince was not moving in the direction which he had a reason to anticipate from her lights, but was moving exactly in the opposite direction. Of course, when that situation developed, then of course [232] the collision was inevitable. So that, under those circumstances, we submit that the Master of the Roustabout under the circumstances should not be charged with negligence. And the negligence of the Eastern Prince is, of course, obvious. She had improper lights.

The Court: What have you got to say, Mr. Henke, on the question of him being on the wrong side of the channel?

Mr. Henke: That is the point I was mentioning. I don't say that he was on the wrong side of the channel. You may have a point which you designate and say, "This is mid channel." But you will always recall the Captain's testimony that he was then off the estuary of the Campbell River and that he was leaving himself sufficient room to protect himself against the possibility of a vessel of that type running aground in the Campbell River estuary as he passed it.

Of course, bear in mind that he saw the whole passage ahead of him; that is, he saw the whole inside passage that was available to him then, with no

vessel approaching as far as he was concerned; so that naturally, had he been conscious of the fact that there was another vessel approaching, he would probably have taken some action to have either stopped his ship or [233] have otherwise acted to protect himself against the double hazard of the possibility of collision and the possibility of going aground in the Campbell River estuary. But under those circumstances he figured that he was perfectly justified in proceeding and overtaking this vessel which was ahead of him.

Remember that the vessel which he assumed that he was overtaking was from his standpoint moving in the same direction he was. He was moving to overtake this vessel, and he was not considering the possibility of a vessel moving in the other direction—in the opposite direction. He had no reason to suspect that, because he could see no lights of any approaching vessel. All he could see was a vessel going in the same direction as himself. And, as far as he was concerned, bear in mind that this vessel that he saw, that he was approaching, was further over—from his standpoint, was further over in the middle of the channel than he was. So that I don't think that under those circumstances he could be considered as acting unreasonably at all.

He was trying to protect his vessel against the estuary. He was doing it on a reasonable basis. He saw the vessel which he was overtaking, which was further over near the east shore—that is, towards [234] the mainland—than he was. It seems to me that his actions there are entirely reasonable

and thoroughly in accord with the International Rules. He never had a chance to clear himself after the status of the Eastern Prince became known to him.

All agree that the Eastern Prince, when they made this turn hard to the right, then the Eastern Prince was put in such a position that the Roustabout could see those lights. But until that occurred, the Roustabout couldn't see those lights. Of course, bear in mind that there is this situation which exists in respect to those two vessels: (1) The Eastern Prince, here, is a vessel which lies rather low in the water, a relatively small ship. She is low in the water and she has all of the lights on her; whereas the crew of the Roustabout are way up high as compared to the Eastern Prince; that is, they are about 25 or 30 feet up above her. And, of course, all that they see is the glare of these white lights; so that their analysis is, of course, that she is merely one of these smaller vessels going the same way as they are. So it doesn't seem to me that the Roustabout is chargeable with negligence until you show some situation where the Captain was put on notice that there was an oncoming vessel and that he was obligated to do [235] something to protect it.

I don't think there can be any question that the Eastern Prince, with the lights that she had on her—and, of course, I think the decisions generally show that the carrying of improper lights is considered one of the negligent things that can be done, because in navigating at night all that the Master of the vessel has to go on is the lights you show. If

you show lights which are improper and deceive him, he, of course, will act in a manner which is entirely inconsistent with what the facts would be. So that we would submit that, under the circumstances there, the Master of the Roustabout was without fault and the accident itself was solely the result of the negligence of the Eastern Prince.

It seems to me that the two questions—first, the basic question as to the existence of war risk circumstances which would justify a recovery; and second, even though it could be assumed that the Roustabout was operating as a war ship, as that term is employed, that the Master of the Roustabout was sufficiently negligent to justify a recovery or was negligent at all. So that under the circumstances we submit that the libelants are not entitled to recovery—and, as I say, we desire to submit this [236] brief so that your Honor may fully appreciate our position on the question.

Mr. Long: May it please the Court, I have no desire to belabor many of these points but I would like to touch upon some of them.

We had in mind opening the argument by discussing the characteristics of the Roustabout, her functions and the navigation of the two vessels. The Court has indicated mutual fault to be the Court's conclusion under the evidence.

I would like to touch briefly upon the glaring faults on the part of the Roustabout; first, the Narrow Channel Rule. All agreed that the vessels were operating under International Rules.

Article 25 of the International Rules is known

as the Narrow Channel Rule and provides that a vessel shall stay to its right or starboard side of mid-channel. I asked Captain Parks—and subpoenaed him to be here—whether or not at the time of and prior to the collision he was navigating on the east or portside—to him—of mid-channel. He admitted that he was. He is thereby guilty of a statutory fault without further ado.

It has been suggested that the reason he was [237] navigating on the easterly shore or his wrong side of the channel, the same as if I was driving my car down the best side of the road, was because there was not enough water on his side of the channel. I asked him if there was enough water to go to the right and he said it was safe but not practical.

There is no doubt as to where this collision took place. It is marked on the exhibit by Captain Rose and the testimony given by Captain Parks was just the same. It was on the left-hand side, on Captain Parks' left-hand side of this narrow channel. All are agreed that this is a narrow channel; Captain Parks and Captain Rose and all of the witnesses who were interrogated on this subject.

The Court can see very plainly, Captain Parks being southbound and the collision having occurred on the eastern side of the channel, there is as much as 34 fathoms, three-quarters of a mile to his right—six feet to the fathom, and his vessel draws about twelve feet. So he had thirty-two fathoms under his keel, three-quarters of a mile to his right. So

it seems to me that disposes once and for all of any question concerning a violation of the Narrow Channel Rule.

I asked Captain Parks, as the second question: [238] "Did you, after sighting the lights of the Eastern Prince, alter your course without sounding the whistle signals required by the International Rules?" He said, "I did." That is the second statutory fault.

Since the inception of this case, which I investigated in Vancouver on behalf of the owners of the Eastern Prince, I was never able to satisfy myself as to why the Roustabout, after presumably seeing the Eastern Prince's red light, turned left—across the channel, further to the left and ran into her. I couldn't understand that. I understand it now, after hearing the lookout of the Roustabout, here this morning—who I had never heard or seen before. I call the Court's attention to his testimony very briefly and it is this: He was asked "What were your duties as a lookout?" He said—which is true—"My duties were to be in the bow of the ship and look forward and call the navigating officer's attention to logs, lights, and other ships and report them." He was then asked, "Did you see the red light of the Eastern Prince?" He said, "I did." He was then asked, "What did you do?" He said, "I took no action whatsoever." Now, it is plain to me as to what happened. I don't know what the lookout was doing but I am satisfied that he was guilty of negligence [239] in failing to report that ship. The decisions are so uniform. I

could point to literally dozens of them on the subject but I will read just briefly from the Rules of the Road by Commander Wordsworth, page 252, in which he cites and quotes from two cases from the Circuit Court of Appeals in the New York District, the outstanding Admiralty Circuit:

“The failure of the lookout of a steamer to report a vessel when discovered is negligence, although the Master and pilot were on the bridge. A lookout’s duty is to report as soon as he sees any vessel with which there is danger of collision or which in any way may affect the navigation of his own, and he can not speculate on the probabilities of collision, such responsibility being for the Master.”

It is a most elementary phase of collision law that it is the duty first to have a competent lookout when circumstances require, and they did here, because they had one; and secondly, it is the duty of the lookout to report what he sees. That is what he is there for. That is why they put him out in the eyes of the ship and he is forward of the bridge and can see better. Further, the International Rules require a [240] lookout, a proper lookout. The courts have said time innumerable “The mere fact that you station a man on the bow and call him a lookout, even though he may be qualified, he is an improper lookout under the Articles—International Rules—if he fails to perform his function as a lookout.” He becomes improper because he is negligent. And certainly we have from the witness’ own mouth—he saw the red light of the Eastern

Prince and he took no measures whatsoever. That is the third statutory fault.

With respect to this argument, which is not novel in these cases—collision cases are heard in this court every day in which vessels have been backing to stern for at least ten minutes but they still collide. It has been testified here that they thought they were overtaking a vessel by seeing only white lights. If that be true, they are still hung by their own statement and guilty of a fourth statutory fault. Article 24 of the International Rules makes it mandatory for a vessel overtaking another one to keep out of the overtaken vessel's way. In other words, you overtake a vessel at your peril. You either stop—if there is any danger of overtaking a vessel and passing her—you are [241] absolutely at your peril when you pass an overtaken vessel unless you are satisfied that your passing is completely safe either to one side or the other by appropriate whistle signals. No whistle signals were sounded here in any respect.

So we have by the Master of the *Roustabout* admittedly two statutory faults. And the testimony of the respondent's witness on the stand this morning, Beasley, an admitted fault in his failure to perform his duties as a lookout, failure to perform the duty after he saw it and failure to keep out of the way of an overtaken vessel, if that is what they thought it was. They are hung whichever way they jump here.

I have tried Admiralty cases in this court for twenty years and I have never seen a case in which

there are more glaring faults as in this case, here, on the part of the Roustabout. I have never seen such glaring faults admitted in court. I disregard entirely the testimony of the interested witnesses. I take the testimony of Captain Parks and Beasley. They are guilty of four statutory faults beyond a peradventure of a doubt. I don't believe counsel could argue to you the contrary.

Be that as it may, for the purposes of this case we are concerned with the sole fault on the part [242] of the Roustabout or mutual fault. For the purpose of this case it makes no difference whatsoever. I gather that the Court's view is that there is possibly some fault on the part of the Eastern Prince. I am not going to labor that point. But certainly I am going to labor the point that there were at least four statutory faults on the part of the Roustabout beyond any question whatsoever.

In connection with that fault, I call the attention of the Court to the so-called Pennsylvania Rule. Those who practice collision law are either delighted with that rule or horrified with the rule, depending upon which side of the case they are upon in a good many instances.

The rule is that one who violates a statutory rule has the burden of showing that not only did not the violation contribute or that it probably didn't contribute but that it could not possibly have contributed.

Judge Netterer has said, and the Circuit Court of Appeals has said, in discussing that rule, that it is a stringent rule, it is a tough rule, but therein

lies the penalty to the violator of the rules of the road. We have cited that case in our memorandum.

There have been numerous cases in which they have exhaustedly treated that rule and its application. In a couple of cases, much to my unhappiness, they have treated it in an unfavorable light in cases I was in. The Denalley case, the Princess Sofia, Nelson against Puget Sound Navigation Company—all of our own Circuits—have held that the Pennsylvania Rule does apply in case of a statutory fault. So the burden is upon the respondent, here, or upon the part of the Roustabout to show that those faults or either of them could not possibly have contributed. That is an impossible burden. I don't know of any way to meet it. And, of course, here there is no evidence whatever that it didn't contribute, let alone any presumptions.

On the question of—I just want to mention one other phase of this. The Court may recall that I interrogated Captain Parks as to how soon he could stop his ship dead in the water under those circumstances. He said that at eight miles an hour, of course, a ship does travel 600 feet a minute approximately. It is slightly more than that, but take his figure. He said it would take him three minutes to four minutes at best to stop, under those circumstances; and he didn't start to stop until he saw the [244] red light of the Eastern Prince, he admitted. So he must have seen the red light of the Eastern Prince almost a half mile away, under his own computations, and all he had to do was to go hard right and he would miss the ship entirely; in

other words, get to his side of the channel or somewhere near it and there would have been no collision.

The Court will recall Mr. Beasley's testimony. He said, "After I saw the red light, I took no steps whatsoever about it." He said that the course of their vessel was changed—not to the right to avoid a collision, but to the left. At all times, he says, the *Eastern Prince* was going to her hard right. So here we have two vessels coming, and they just come together; just the same as if your Honor was driving a car down the road and turned across to the left, across the oncoming traffic, and the other car turning to the right to try to miss him. It is just that simple, to me.

So much for the faults of the *Roustabout*. Now, with respect to the characteristics of this vessel. I am satisfied and I hope the Court is that the testimony here goes far beyond and is much stronger than any allegations in our libel. I didn't know that this vessel carried bombs northbound and I [245] didn't know she carried damaged airplane parts, torpedo cases, and was actually on a shuttle service until this case started. But here we have this situation: We have a former merchant vessel, taken over by the Navy and commissioned as an active arm of the Naval Forces, in the prosecution of the war; and there just isn't any question about it. All of the witnesses stated so. She is armed, and manned with officers of the Navy, manned with unlicensed enlisted men of the Navy and performing a very vital function in those early days of the

war, of prosecuting the war effort which was very critical in Alaska waters at that time, I can assure you.

It seems to be Counsel's contention that because before her induction, let us say, into the Navy, she was a Merchant ship; and after she had served her functions during the war years, she possibly became a Merchant ship again—I assume she did, I don't know—and thereby she was just a peaceful Merchant ship and not a war ship. It seems to me that that argument is answered in this way: The Court knows that many men selling shoes, selling papers and in every walk of life as civilians were inducted into this man's army and handed a gun. After they served their service, if they survived it, they went back to selling shoes, [246] selling insurance. Can it be said that those men weren't soldiers and members of the Armed Forces before they went in the Army, merely because they weren't before? Positively not.

Here we have a ship engaged in shuttle service—that isn't Counsel's argument—the witnesses said that, including Mr. Beasley whom I had never seen before. Admiral Zeusler said she was in a shuttle service and explained it. Commander Jones, who had jurisdiction of her, said she was in that service. Captain Parks said she was in that service. I don't know how else we can prove it except by the men who know. She was engaged in the vital mission of carrying petroleum products, materials of war, armament from war bases right here in Seattle—

no commercial bases, no commercial docks—right out from Pier 91, a naval base, to the very vital war bases in Alaska—for what use? For the use of the fighting forces of our Navy and Coast Guard in those waters.

Counsel apparently placed some stress on the fact that the Japs didn't attack Southeastern Alaska with forces of planes or men. The testimony is plain that a submarine was sunk near Sitka and they were patrolling out there with both aircraft and [247] naval surface craft. Let me ask what this company was insuring when they were insuring war risks? They insured this vessel for war risk and they took our premium and yet the warrant is as follows: "Warrant confined to waters of—(reading)—British Columbia and Southeastern Alaska, not west of Cape Spencer."

Now, Cape Spencer is the beginning of the Gulf of Alaska up near Juneau. The Japs attacked out to the westward, it is true, so far as their land forces were concerned. It doesn't seem to me to lie in Counsel's mouth to say that the Japs were firing over there 2,000 miles away but they took the premium and confined it to just these waters. Why? Because there were war risks there. That is why we bought the insurance and that is why they issued it. It goes, I think, somewhat to the frailty of the suggestion made by Counsel.

It makes no difference, it seems to me, if your Honor please, whether or not this Roustabout was coming south to Seattle again with nothing in her tanks but salt water and nothing aboard but salt

water. She was coming back for what purpose? To get another load of war materials and fuel oil and get back up there and keep the war going. That was her function and it was her function all during the war. But we have more [248] than that here. We have evidence that she did bring armament southbound. She brought defective ammunition, she brought torpedo cases, she brought gasoline drums for refilling and returning. She did the normal things that any vessel returning would do. I can see no difference whatever in her situation, here, than if the Battleship Washington or the Carrier Lexington or any of our primary fighting fleet—after having been in the war zone—returned to Bremerton over here for a new crew or re-supplies or whatever was needed; if that vessel coming back in the sound had struck another ship, no one would contend that that wasn't a war risk under any of the conditions.

Admiral Zeusler and Captain Parks said this was just as important a ship as any ship the Navy had. You couldn't use a battleship to do this job; you couldn't use a carrier to do this job; you had to use a tank vessel. Counsel has suggested that the function of this vessel, because of her designation "YO," which means Yard Oiler, would confine her to these waters. The Court will recall that I asked Commander Jones, in connection with this designation "YO," if she had to be there and he said, no, that is in reference to her tonnage. The larger vessels are "AO's" and the smaller ones "YO's." But that seems [249] to me to be immaterial here.

What did she do? She carried cargo between these naval depots. I can't imagine of any more necessary function, short of being sunk by aircraft or war shelling.

This question basically was argued before Judge Bowen all of one day and parts of two or three other days. It was exhaustively argued. Counsel has indicated that he wishes to file further briefs. I listened carefully to see just what material he expected to be covered by such a further brief. He has indicated no new cases determinative of this issue since the filing of Judge Bowen's opinion in 1944. I think, your Honor, that we are now in a position for the Court to decide this case, make findings and dispose of it. I know of nothing new that Counsel has indicated as argument he desires to present in any further briefs. I don't mind the additional work but I don't think it is going to accomplish anything. I don't know of any further cases that he has suggested that he would cite in a further brief. I shall leave that, of course, to the Court's own discretion in the matter.

I am not going to review all of these war risk opinions. I think they are carefully presented in the briefs so far filed. With those remarks on those two particular subjects, I will close. [250]

The Court: Considering that there were just two facts that the Court really was required to determine and pass on here—first, the question of whether or not this was a war risk or a war operation; and second, whether or not the ship *Rousta-bout* was at fault, I feel convinced that my findings

would be as indicated. But still I don't want to deprive counsel of the right to present further argument or authorities; and while I made the statement, which was more or less emphatic as to my views, I am always willing to be convinced. Those views were an expression of my feelings but there is nothing at all involved in this case or in any other case that I would foreclose the idea that if I was convinced that I was wrong, that I wouldn't graciously and gladly decide the other way.

If Counsel thinks that he can convince me that my views, expressed here, are wrong, I am going to give him an opportunity to do so.

Mr. Long: We will cooperate.

Mr. Henke: I think I owe it to my client.

The Court: I think I owe it to you or anyone else in your position to be willing to listen and consider. I want to do that.

Mr. Long: Very well. We will share the [251] expense of the record, your Honor, as we have indicated.

The Court: If there is nothing further to be done at this time in this case, the matter will stand submitted until the briefs are filed.

Twenty, twenty, and ten, is that a satisfactory apportionment of the time?

Mr. Long: I think that is satisfactory, your Honor. If we happen to be on vacation, when Counsel filed his brief, we might be a day or two overtime.

The Court: I don't think we will have any difficulty on that score.

Mr. Henke: No.

Mr. Long: No, I believe not.

(At 4:10 p.m., Thursday, July 17th, 1947, Court recessed, the present case being submitted on the record with briefs to be filed as indicated by the Court, the case being taken under advisement, decision to be rendered at a later date.) [252]

CERTIFICATE

I, Merritt G. Dyer, Official Court Reporter, United States District Court, do hereby certify that I reported all of the proceedings in the foregoing case and that the transcript thereof is a full, true, and correct statement of the proceedings occurring therein.

/s/ MERRITT G. DYER,
Official Court Reporter.

[Endorsed]: Filed Oct. 8, 1947. [253]

[Endorsed]: No. 12001. United States Court of Appeals for the Ninth Circuit. General Insurance Company of America, a corporation, Appellant, vs. Henry O. Link, E. W. Elliott and O. L. Grimes, Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division. Filed July 31, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

In Admiralty—No. 12001

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,
Appellant,

vs.

HENRY O. LINK, E. W. ELLIOTT,
and O. L. GRIMES,
Appellees.

ADOPTION OF POINTS TO BE RELIED
UPON ON APPEAL AND DESIGNATION
OF PORTIONS OF APOSTLES ON AP-
PEAL TO BE PRINTED.

Comes now the General Insurance Company of America, a corporation, Appellant in the above-

entitled case, by its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann, by Harry Henke, Jr., and hereby formally adopts the Assignment of Errors filed by it in the court below as the Statement of Points to be Relied Upon by the said appellant, On Appeal.

Appellant further designates the entire Apostles on Appeal, with the exception of the original exhibits which have been transmitted to this court by the court below, to be printed.

Dated at Seattle, Washington, this 9th day of August, 1948.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ [Illegible],
Proctors of Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 12, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AUTHORIZING CONSIDERA-
TION OF ORIGINAL EXHIBITS

It is hereby stipulated and agreed by and between the appellant, General Insurance Company of America, a corporation, by and through its proctors, Skeel, McKelvy, Henke, Evenson & Uhlmann, and the appellees, Henry O. Link, E. W. Elliott, and O. L. Grimes, by and through their proctors, Bogle, Bogle & Gates, that the original exhibits introduced at the trial of the above entitled action shall be considered by the above entitled court in their original form without the necessity of their being printed.

BOGLE, BOGLE & GATES,

By /s/ THOMAS L. MORROW,
Proctors for Appellees.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ (Illegible),
Proctors for Appellant.

It is so ordered.

Done in open court this 25th day of August, 1948.

/s/ WILLIAM DENMAN,
Judge of the United State Court of Appeals for the
Ninth Circuit.

[Endorsed]: Filed August 27, 1948. Paul P.
O'Brien, Clerk.

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation, *Appellant,*

v.

HENRY O. LINK, E. W. ELLIOTT and O. L. GRIMES,
Appellees.

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE ROGER T. FOLEY, *Judge*

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN
By HARRY HENKE, JR.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation, *Appellant,*

v.

HENRY O. LINK, E. W. ELLIOTT and O. L. GRIMES,
Appellees.

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE ROGER T. FOLEY, *Judge*

SKEEL, MCKELVY, HENKE,
EVENSON & UHLMANN
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JURISDICTIONAL STATEMENT

This is an appeal from the final decree entered in favor of the appellees in the above entitled action by the United States District Court for the Western District of Washington, Northern Division. The action was a libel in admiralty and in consequence the trial court had jurisdiction by virtue of Title 28 U. S. C. A. Sec. 41 (3) which confers upon the United States District Courts original jurisdiction of all civil causes of admiralty and maritime jurisdiction.

This court has jurisdiction of the present appeal by virtue of Title 28 U. S. C. A. Sec. 225 which provides as follows:

“(a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error, final decisions—

“First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.”

STATEMENT OF THE CASE

This appeal is from a final decree entered in favor of the appellees upon a libel filed by them in the United States District Court for the Western District of Washington, Northern Division.

The appellees, who were libelants below, filed a libel against the appellant in order to recover for a loss sustained by the *M.V. Eastern Prince* as a result of a collision with the *U.S.S. Roustabout* on the night of May 11, 1942. Prior to that date the appellant had issued to appellees a policy of marine insurance whereby appellant contracted to indemnify appellees for any war risk loss sustained by the vessel *Eastern Prince*. Appellant did not, however, contract to indemnify appellees for any marine risk loss sustained

by the *Eastern Prince*, such a policy of marine insurance having been issued to appellees by an underwriter other than appellant.

At a time when the *Eastern Prince* was proceeding northward on a commercial voyage from Seattle to Skagway, Alaska, she collided with the *Roustabout*, which was proceeding southward from Sitka, Alaska, for Seattle. This collision took place in the night at a point near Seymour Narrows in the Inside Passage to Alaska.

The *Roustabout* was a small commercial vessel, which had been requisitioned by the United States Navy for use as an auxiliary tanker. At the time of collision she was a commissioned vessel of the navy and, as such, was manned by commissioned officers and men of the navy. The armament of the *Roustabout* was light and for defensive purposes only, consisting of one three-inch, fifty-calibre gun, two fifty-calibre machine guns and two twenty-millimeter anti-aircraft weapons. Her naval classification was "Y. O." or "Yard Oiler," and she was assigned to the 13th Naval District. Prior to the collision in question the *Roustabout* was engaged in carrying bulk petroleum products from Seattle to Southeastern Alaska for the use of the Navy and Coast Guard in that area.

At the time of the collision the *Roustabout* was returning to Seattle in ballast. She had a small cargo hold for the stowage of dry cargo, but there was no direct testimony at the trial below as to the identity of any dry cargo which the *Roustabout* may have had in that hold at the time of the collision. Testimony was introduced, however, as to the character of the dry cargo commonly carried by the *Roustabout* when southbound from Alaska. The trial court found that on southbound trips the *Roustabout* carried such dry

cargo as empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles. The court further found that at the time of the collision, the *Roustabout* had aboard water ballast and miscellaneous dry cargo of the nature of that above mentioned.

The court found that the *Eastern Prince* was at fault in failing to exhibit red and green navigation lights, as required by law, these navigation lights having been obstructed by the deck cargo of the *Eastern Prince*. The court also found that the *Roustabout* was at fault in failing to keep to the right of the narrow channel, in failing to indicate a change of course on her whistle when within sight of the *Eastern Prince*, and in failing to keep a proper lookout.

The trial court found that at the time of the collision the *Roustabout* was engaged in warlike operations and that the collision and damage resulting therefrom to the *Eastern Prince* was a consequence of those warlike operations. The court further found that the collision occurred by reason of the mutual fault of both vessels and entered a final decree in favor of the appellees in the sum of \$11,031.29 with interest thereon at 6 per cent per annum from the 11th day of September, 1942, together with the costs incurred by appellees.

SPECIFICATIONS OF ERROR

1. The court erred in its conclusion of law that the *U.S.S. Roustabout* was engaged in warlike operations at the time of its collision with libelants' vessel, the *M.V. Eastern Prince*.

2. The court erred in its conclusion of law that the collision and damage resulting therefrom to libelants' vessel, the *M.V. Eastern Prince*, was a consequence of warlike operations of the *U.S.S. Roustabout*.

3. The court erred in its conclusion of law that the collision between the *M.V. Eastern Prince* and the *U.S.S. Roustabout* was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the *M.V. Eastern Prince* and that libelants were entitled to judgment against respondent upon that policy of insurance.

4. The court erred in its conclusion of law that at the time of the collision the *U.S.S. Roustabout* was employed solely for naval tanker purposes.

5. The court erred in its finding that at the time of the collision the *U.S.S. Roustabout* had aboard dry cargo of the nature of empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles.

6. The court erred in finding that at the time of said collision the *U.S.S. Roustabout* and the *M.V. Eastern Prince* were both at fault.

7. The court erred in finding that the said collision occurred by reason of the mutual fault of both vessels.

8. The court erred in granting to libelants interest upon their judgment from the 11th day of September, 1942, rather than from the date of entry of the final decree in this cause.

9. The court erred in overruling respondent's exception to the sufficiency of the libel and in holding that the amended libel stated a cause of action.

I.

Appellant as War Risk Underwriter Became Liable to Appellees Only if Collision Between the Eastern Prince and the Roustabout Was a "Consequence of Hostilities or Warlike Operations."

The standard policy of marine insurance has tra-

ditionally enumerated the "adventures and perils" insured against in the following words:

"Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jet-tisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, and ship, etc., or any part thereof."

II Arnould, Marine Insurance and Average
(10th ed.) 1039.

During the Napoleonic wars, however, underwriters frequently inserted a clause which provided that they should not be liable for the risk of capture, seizure or confiscation in port. In time this clause became lengthened to the following traditional language:

"Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

II Arnould, Marine Insurance and Average
(10th ed.) 1157.

This clause is known as the "free of capture and seizure" or "F. C. & S." clause and, when inserted in a policy of marine insurance, relieves the underwriter of any and all losses caused by war risks.

In the policy of insurance issued by appellant to appellees upon the vessel *Eastern Prince*, the perils clause was as follows: (Ap. 14)

“Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, etc., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement.”

The F. C. & S. clause of that policy was as follows:
(Ap. 22)

“Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provisions of the Policy:

F. C. & S. Clause.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise, also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.”

The policy issued by appellant, however, was expressly intended to cover only war and strike risks. These risks were assumed by appellant by means of a rider attached to the policy. Insofar as it is here relevant, that rider provided as follows: (Ap. 24)

“It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.”

It is hence to be seen that by its contract of insurance appellant assumed to indemnify appellees for the very risks excluded by the ordinary F. C. & S. clause—and only for those risks. In other words appellant contracted to indemnify respondent “for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise, also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.”

It is clear that appellant became liable for damage to the *Eastern Prince* only if that damage was a “consequence of hostilities or warlike operations,” for that damage was plainly not caused by capture, seizure, arrest or any other of the perils enumerated in the F. C. & S. clause. If the loss incurred by the *Eastern Prince* was not a “consequence of hostilities or warlike operations,” it must fall upon the underwriter of the ordinary marine risks rather than upon the appellant as war risk underwriter.

II.

The Collision of the *Eastern Prince* and the *Roustabout*

Was Prima Facie a Marine Risk and the Burden Was Upon the Appellees to Prove That It Was a War Risk.

It is universally conceded that the collision of two vessels is prima facie a "peril of the sea" as that phrase is traditionally employed in the standard policy of marine insurance. It has indeed been said: "There are certain general classes of accidents which are always held to be perils of the sea. They are the three following: (1) Collision, (2) Foundering, (3) Stranding, shipwreck or grounding."

Abbot, *Perils of the Sea*, 7 Harv. L. Rev., 221 at 224;

See also: II Arnould, *Marine Insurance and Average* (12th ed.) 1098.

Since a collision is presumptively a peril of the sea, the burden of rebutting that presumption must be assumed by the party denying that a particular collision was a marine risk.

Britain Steamship Company, Ltd., v. The King (1921) 1 A. C. 99.

In the present case the burden is not upon the appellant to establish that the *Eastern Prince-Roustabout* collision was a marine risk, but rather is the burden upon appellees to establish that the collision was not an ordinary marine risk.

III.

Appellant as War Risk Underwriter Became Liable for Damage to the Eastern Prince Only If (a) the Roustabout Was Engaged in a Warlike Operation and (b) The Collision Was Proximately Caused By That Warlike Operation and (c) the Roustabout Was Wholly or Partially at Fault.

It would seem that it could be determined with ease whether any particular marine loss was one to be as-

sumed by the marine risk or the war risk underwriter. Quite the opposite, however, is found to be true. Even the most cursory examination of the reported cases reveals that during and after three different wars, the American Civil War, World War I, and World War II, the courts of both England and America have been repeatedly confronted with the problem of characterizing a loss as being a marine risk or a war risk loss. As will appear in this brief, it is an area of the law replete with contrary and irreconcilable decisions. One judge has remarked as follows concerning it:

“I find it most difficult to extract any guiding principle from the judgments. Dictum conflicts with dictum and decision opposes decision.”

Harrisons, Limited, v. Shipping Controller,
(1921) 1 K. B. 122.

In their treatment of the present problem the English courts have refused to declare that one of two cases, in irreconcilable conflict, is wrong. Their procedure has been to seize upon factual differences, which have been in fact not differences at all, in order to justify a decision patently contrary to one or more prior decisions. This has inescapably resulted in a welter of decisions requiring critical re-examination.

Were we dealing with the decisions of the American courts alone, the need for such re-examination would be absent, for, as will appear, the American courts have, with the exception of the trial court in the case at bar, spoken with uniformity of principle. Whenever they have been confronted with the issue of war or marine risk, the courts of this country have approached that problem in the same manner and have, in consequence, arrived at decisions perfectly consistent one with the other.

The many decisions concerning war and marine

risks have enunciated principles almost as numerous as the factual situations upon which those decisions were predicated. Too often those decisions have been entirely ad hoc, yet from them may be deduced certain general principles applicable to all war risk cases.

The problem of whether a risk is a war or a marine risk almost invariably arises in one of two ways. In suits against marine underwriters the latter have urged that the loss was a war risk and hence excluded by the F. C. & S. clause of the policies issued by the marine underwriters. In suits against war risk underwriters, the latter have urged that the loss was a marine risk and hence not within the coverage of policies of insurance issued by those underwriters.

In many cases of marine damage there is not the slightest controversy as to the characterization of the loss. For example, losses resulting from torpedoing, from floating mines, from aerial bombing and from shore bombardment are obviously war risk losses. On the other hand, a loss resulting from a fire unconnected with a warlike operation, or from stranding while engaged in a purely mercantile voyage, is just as obviously a marine risk loss.

A controversy between marine and war risk underwriters has almost invariably arisen, however, whenever a typically marine casualty, *i.e.*, damage by wind or wave, by a collision, or by a stranding, has occurred at a time when the vessel in question was more or less connected with a war operation.

Typical of such war risk-marine risk controversies is the case at bar, for here a collision, a *prima facie* marine risk, occurred between the *Eastern Prince* and the *Roustabout* at a time when one of the vessels, the *Roustabout*, was, it is contended by appellees, engaged in a warlike operation.

The reported cases have laid down certain rules for characterizing any particular casualty as a war risk or as a marine risk loss. The first of these is that the war risk underwriter does not become liable for a loss suffered by a vessel from a typical marine casualty (collision, stranding, or damage by wind and wave) if that vessel, nor the other vessel in case of collision, was engaged in a warlike operation. The facts of a few of the decided cases will make this clear.

In *Wynnstay Steamship Company, Ltd., and W. I. Radcliffe Steamship Co., Ltd. v. Board of Trade*, (1925) 23 Ll. L. Rep. 278, the *Radcliffe* collided with the *Sylvan Arrow* in an anchorage. The *Radcliffe* was a merchantman; the *Sylvan Arrow* was a U. S. Navy tanker. It was there held that at the time of the collision, neither vessel was engaged in a warlike operation and hence that the loss could not be a war risk loss.

So also in *Clan Line Steamers, Ltd., v. Liverpool and London War Risks Insurance Association, Ltd.*, (1943) 1 K. B. 209, the *Clan Stuart* collided with the *Orlock Head* while the former was proceeding with cargo from England to South Africa and the latter was carrying a cargo from England to France. It was held that neither vessel was engaged in a warlike operation and hence that the loss could not be a war risk loss.

It is hence to be seen upon the authority of the foregoing cases alone, and more could be cited, that a loss by a traditional peril of the sea cannot be a war risk loss unless one or more of the vessels involved was at the time of the injury engaged in a warlike operation.

The second general principle to be deduced from the decided cases is that even though an ordinary marine loss occurs while one or more of the vessels involved is engaged in a warlike operation, the marine risk underwriters are liable unless the loss was proximately

caused by the particular warlike operation in question.

In *Leyland Shipping Company, Ltd., v. Norwich Union Fire Insurance Society, Ltd.*, (1918) A. C. 350, the *Ikaria* was torpedoed but was able to make the Port of Havre and there moored alongside a quay. Subsequently, a gale sprang up, and the *Ikaria* was moved to a mooring in a more exposed position where she was sunk by the wind and waves. It was there held that the proximate cause of the sinking was the torpedoing and that the loss was hence a war risk loss despite the fact that the *Ikaria* was, as a matter of fact, engulfed by heavy seas. Lord Dunedin said in that case at (1918) A. C. 350 at 362:

“... You must seek for the *causa proxima*, if it is well understood that the question which is *proxima* is not solved by the mere point of order in time.”

In *Ionides v. The Universal Marine Insurance Assn.*, 14 C. B. N. S. 258, 143 E. R. 445 (1863), the *Linwood* was on a voyage from Rio de Janeiro to New York with a cargo of coffee. At the time the American Civil War was in progress and Confederate soldiers had extinguished the light at Cape Hatteras in order to harass Federal shipping. The *Linwood* went aground near Cape Hatteras and was lost. The court held that the loss was a marine risk loss, Willis, J., saying at 143 E. R. 445 at 457:

“It (the extinguishment of the light) may or may not have been the cause of the vessel being destroyed; but it was not the proximate and absolute certain cause of the loss. The proximate and absolute cause of the loss was the vessel being out of her course and getting on the rocks at Hatteras Inlet.”

In *Britain Steamship Company, Ltd., v. The King* (1921) 1 A. C. 99, the *Petersham* collided with an-

other vessel at a time when the *Petersham* was sailing in convoy without lights on a voyage from Bilbao to Glasgow with a cargo of iron ore. In discussing causation, Viscount Cave said at (1921) 1 A. C. 99 at 107:

“In order to establish that (the collision was a ‘consequence of hostilities or warlike operations’) it is necessary to show, first, that there were hostilities or warlike operations which could have caused the collision, and secondly, that the collision was a direct and proximate consequence of those hostilities or warlike operations.”

So also in *Yorkshire Dale Steamship Co., Ltd., v. Minister of War Transport* (1942) A. C. 691, 58 T. L. R. 263 the Lord Chancellor said at 58 T. L. R. 263 at 264:

“Authority is hardly needed for the proposition that you do not prove that an ‘accident is the consequence of a warlike operation’ merely by showing that it happened ‘during’ a warlike operation. For example, if a commercial vessel while proceeding from one war base to another with munitions on board is destroyed while at sea by accidental fire the cause of which is quite unconnected with the nature or method of her journey or the nature of the cargo she carried, I should suppose that it could not be said that her destruction was proximately caused by her warlike operation.”

In II Arnould, *Marine Insurance and Average* (12th ed.) 1090 it is stated:

“In order to sustain the allegation that the loss was by perils of the seas or by any other perils insured against, it must be shown that such perils were the proximate cause of the loss.”

In Poole, *Marine Insurance of Goods* (1st ed.) it is stated at page 192:

“With special reference to the perils insured against the rule of *causa proxima non remota spectatur* has to be applied in determining the

cause of the loss; that is, in the event of a complication of causes, the proximate cause and not the remote cause, must be regarded in order to decide for the purposes of insurance the peril to which the loss is to be attributed. Or, as has been previously seen, the indemnity of the policy is stated expressly to be available only in the event of the loss being due to specific perils—and the loss in question may be due to one that is not specified, as determined by the *causa proxima* rule.”

In England the common law rule that an underwriter is liable for only those losses proximately caused by the perils insured against became a part of the statutory law of that country by virtue of the Marine Insurance Act, 1906, 6 Edw. 7, c. 41. Sec. 55 of that Act provides as follows:

“Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.”

Our Supreme Court has made it incontrovertibly clear that this rule of proximate cause prevails in the United States and that an underwriter is liable for only those losses proximately caused by the peril insured against.

Morgan v. United States, 81 U. S. 531, 20 L. ed. 738 (1872);

Queen Insurance Company v. Globe & Rutgers Fire Insurance Co., 263 U. S. 487, 68 L. ed. 402 (1923).

In *Lanasa Fruit Steamship & Importing Co., Inc., v. Universal Insurance Co.*, 302 U. S. 556, 82 L. ed. 422 (1938) the *Smaragd* stranded and her entire cargo of bananas became overripe before the vessel could be refloated. The court said in 82 L. ed. 422 at page 426:

“The sole question is whether in these circumstances the stranding could be regarded as the proximate cause of the loss.”

And thereafter said on the same page:

“It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance.”

The third general principle which may be deduced from the decided cases is that the war risk underwriter does not become liable for a loss caused by collision unless that collision occurred because the vessel engaged in the warlike operation was either wholly or partially at fault. This may best be illustrated by *Clan Line Steamers, Ltd., v. Board of Trade* (1929) A. C. 514. In that case the vessel *Clan Matheson* collided with the vessel *Western Front*. At the time of the collision the *Clan Matheson* was admittedly not engaged in a warlike operation whereas the *Western Front* was so engaged. Both ships were proceeding in the same convoy, when, through no fault of those aboard the *Clan Matheson*, the steering gear of that vessel broke down, and she veered out of column and was struck by the *Western Front*. It was found that the *Western Front* was without fault in the matter. In that case it was held that since the collision occurred through no fault of the vessel which was engaged in a warlike operation, the loss was a marine risk rather than a war risk loss.

a. The Roustabout Was Not Engaged in a Warlike Operation at the Time of the Collision and the Loss Was Hence Not a War Risk Loss.

Specification of Error: 1. The court erred in its conclusion of law that the *U.S.S. Roustabout* was engaged in warlike operations at the time of its collision with libelants' vessel, the *M.V. Eastern Prince*.

Specification of Error: 3. The court erred in its conclusion of law that the collision between the *M.V.*

Eastern Prince and the U.S.S. *Roustabout* was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the M.V. *Eastern Prince* and that libelants were entitled to judgment against respondent upon that policy of insurance.

Specification of Error: 5. The court erred in its finding that at the time of the collision the U.S.S. *Roustabout* had aboard dry cargo of the nature of empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles.

The *Eastern Prince* was admittedly not engaged in a warlike operation. The resultant loss was therefore clearly a marine risk loss unless the *Roustabout* was engaged in a warlike operation. We submit, however, that she was not so engaged.

The *Roustabout* was a small oil tanker designed for the carriage of bulk petroleum products (Ap. 97). At one time she had been privately owned and operated but prior to the time of the collision in question she had been converted into a navy ship and had been placed in commission (Ap. 182). Her navy classification was "Y. O." or "Yard Oiler," and, as such, her activities were confined to one naval district (Ap. 207) as opposed to an "A. O." or "Fleet Oiler." Her speed was slow, being but eight knots (Ap. 193) and her armament lighter than that of an ordinary merchant vessel (Ap. 195). This armament consisted of one three-inch, fifty-calibre stern gun, two fifty-calibre machine guns on the bridge, and two twenty-millimeter guns forward (Ap. 98). As a navy vessel the *Roustabout* was manned by navy personnel (Ap. 81). She, however, was not a combat vessel but was merely an auxiliary vessel under the supervision of the officer in charge of auxiliaries in the 13th Naval District (Ap. 79).

The *Roustabout* regularly ran from Seattle to Southeastern Alaska (Ap. 85), her principal port of call in Alaska being Sitka (Ap. 90). At the time of her collision with the *Eastern Prince* the *Roustabout* was returning to Seattle from Sitka (Ap. 110). Sitka is located in what is known as Southeastern Alaska, which is that narrow strip of coast land extending southward from the main body of Alaska. The Japanese attack nearest to Sitka was one air raid upon Dutch Harbor (Ap. 199), a point one thousand one hundred miles from Sitka. The nearest land occupied by the Japanese was approximately two thousand miles from Sitka (Ap. 199).

On her northbound trips the *Roustabout* carried bulk petroleum products, together with a small quantity of dry stores. The captain of the *Roustabout* testified that the dry stores on the northbound trips were mostly ship's service stores (Ap. 99) and that these ship's service stores consisted of such merchandise as soft drinks, fountain pens and the like (Ap. 99). One of the crew of the *Roustabout* testified (Ap. 208) that the northbound cargo consisted of such general cargo as automobiles, food products, ship's service materials, clothing and the like.

On her southbound trips, and it must be remembered that the collision in question occurred while the *Roustabout* was on such a southbound trip, the *Roustabout* traveled in ballast, *i.e.*, she would carry sufficient water to make her handle properly (Ap. 89). At the time of the collision the *Roustabout* was, as a matter of fact, proceeding in ballast (Ap. 110).

There was no testimony to the effect that there was any specific dry cargo aboard the *Roustabout* at the time of the collision. The captain of the *Roustabout* testified (Ap. 186) that upon the southbound trips the *Roustabout* had at one time or another carried such

cargo as empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks, automobiles, and defective torpedo cases. A member of the crew of the *Roustabout* testified (Ap. 208) that the *Roustabout* carried southward material that needed repair or any material the navy deemed as salvageable, such as air bottles and oxygen tanks for the Coast Guard activities, damaged observation planes, and, from time to time, defective ammunition (Ap. 215). The Coast Guard officer in charge of that sector testified (Ap. 186) that he could remember the *Roustabout's* carrying empty drums, broken cases of old ordnance material, Coast Guard tanks, and occasionally personnel.

Whenever the *Roustabout* reached Sitka, it came under the jurisdiction of the Coast Guard officer in charge of floating units in that sector (Ap. 181) and the petroleum products carried by the *Roustabout* were used in that sector (Ap. 189).

The *Roustabout* went from Seattle to Sitka and returned through what is called the Inside Passage to Alaska. This passage consists of protected waters lying between the coast of Canada and Alaska and the large islands lying off that coast.

At the time of the collision there were no restrictions of any kind as regards navigation lights upon vessels using the Inside Passage. All vessels exhibited, and were required to exhibit, the same navigation lights as are exhibited by vessels in peace time (Ap. 107). All of the shore aids to navigation were in operation as in peace time (Ap. 107), and vessels were not required to zigzag or to be blacked out while underway (Ap. 108).

The mere recital of the facts concerning the character of the *Roustabout*, its cargo, its function, and the locale of its voyages is in itself sufficient to indicate

that the *Roustabout* was not engaged in a "warlike operation," as that phrase is commonly understood.

The decided cases are in accord with the common sense view that such an operation is not "warlike" within the contemplation of those words in a policy of war risk insurance.

In many of the decided cases one of the vessels involved was clearly engaged in a warlike operation and it was by the court so held. The following are cases illustrative of such facts:

In *Ard Coasters, Ltd., v. The King* (1920) 36 T. L. R. 555, the *Ardgantoch* collided with the *H.M.S. Tartar*, a British destroyer, at a time when the latter was engaged in partoling for submarines. It was there held that the *H.M.S. Tartar* was engaged in a warlike operation.

In *Liverpool and London War Risks Ins. Assn., Ltd., v. Marine Underwriters of S.S. Richard de Larrinaga* (1921) 2 A. C. 141, the *Richard de Larrinaga* collided with the *H.M.S. Devonshire*, a British cruiser, at a time when the latter was proceeding at best speed and without navigation lights from Halifax to Hampton Roads in order to pick up and escort a convoy across the Atlantic. It was there held that the *Devonshire* was at the time engaged in a warlike operation.

In *Charente Steamship Co., Ltd., v. Director of Transports*, 38 T. L. R. 148, the *Instructor* collided with the *America*, an ex-German liner, operated as a United States naval vessel and at the time carrying American troops to France. It was there held that the *America* was engaged in a warlike operation.

In *Hain S. S. Co. v. Board of Trade* (1929) A. C. 534, the *Trevanion* collided with the *U.S.S. Roanoke*, an American mine-planter, at a time when the latter was proceeding from England to the United States

with seven hundred and twenty live mines aboard. This collision occurred in December, 1918, after the signing of the Armistice. As the war had not as yet been concluded by a formal peace treaty, it was there held that the *U.S.S. Roanoke* was engaged in a warlike operation.

One need but recall the facts concerning the size, the speed, the armament, the cargo, the conditions of navigation and the function of the *Roustabout* to realize that she cannot in any respect be likened to a British destroyer on anti-submarine patrol, to a British cruiser on its way to pick up and escort a convoy across the Atlantic, to a United States navy transport carrying troops to the battle area in France, nor to a United States naval mine-planter carrying literally tons of tremendously destructive instrumentalities of war.

The only point of similarity between the *Roustabout* and each of the vessels above mentioned is that the *Roustabout* was a commissioned naval vessel. Its official designation was admittedly the *U.S.S. Roustabout* or the *U.S.S.Y.O.* number such and such. Yet, by the mere addition of the three letters "U.S.S.," the *Roustabout* was not transformed from a peaceful tanker into a formidable man-of-war. It was a tanker before its commissioning as a naval vessel; it remained so after that commissioning. It was not a combat vessel before that commissioning; it was not a combat vessel after that commissioning. It was not a warlike vessel before that commissioning; it was not a warlike vessel after that commissioning.

As was testified (Ap. 80), the Navy itself distinguishes combat ships from auxiliaries. The *Roustabout* obviously fell within the latter classification.

In Colombos, A Treatise on the Law of Prize, (Grotius Soc. Pub. No. 5) page 252, the author says:

"It is believed that the best definition of a war-ship is that found in the Proclamation of the President of the United States of May 23, 1917."

That proclamation was Presidential Proclamation 1371, 35 Code Fed. Regs. § 4.161-4.176, concerning the regulation management and protection of the Panama Canal. It provided as follows:

"4.162: A vessel of war, for the purposes of Sections 4.161-4.176, is defined as a public armed vessel, under the command of an officer duly commissioned by the government, whose name appears on the list of officers of the military fleet, and the crew of which are under regular naval discipline, which vessel is qualified by its armament and the character of its personnel to take offensive action against the public or private ships of the enemy.

"4.163: An auxiliary vessel, for the purposes of Sections 4.161-4.176, is defined as any vessel, belligerent or neutral, armed or unarmed, which does not fall under the definition of Section 4.162, which is employed as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding in hostilities, whether by land or seas; but a vessel fitted up and used exclusively as a hospital ship is excepted."

It is thus seen that both the United States Navy and the President of the United States have recognized that there is a fundamental distinction between a combat ship or vessel of war and an auxiliary, even though the latter is indeed a commissioned naval vessel. Under the classification of the Navy the *Roustabout* was clearly not a combat ship. Under the classification of the President of the United States, the *Roustabout* was clearly not a vessel of war as it was obviously not qualified to take *offensive* action against the public or private ships of the Japanese Empire.

When neither of the colliding vessels has been a

warship, even though one has been a naval vessel, the loss has been a war risk loss only if one or more of the colliding ships was at the time actually engaged in a warlike operation. For example, in the *Instructor* case, *supra*, the *Instructor* collided with the *America*, an ex-German liner which had been taken into the United States Navy, and was being used for conveying American troops to France. It was there held that the *America* was engaged in a warlike operation, not because of her being a U. S. naval vessel, but because of her carrying troops from the United States to the combat area in France.

So also in *Wynnstay S. S. Co., Ltd., v. Board of Trade*, 23 Ll. L. Rep. 278 (K. B. 1925), there was a collision between the *Radcliffe* and the *Sylvan Arrow*, a unit of the U. S. Navy. Despite the fact that the *Sylvan Arrow* was a naval vessel and the nation was at war, it was held that the *Sylvan Arrow* was not at the time engaged in a warlike operation. Similarly in *Admiralty Commissioners v. Brynawel S. S. Co.*, 17 Ll. L. Rep. 89 (K. B. 1923), a collier was damaged by bumping into a British minesweeper while coaling her. Despite the fact that one of the vessels involved, the minesweeper, was a naval vessel, it was there held that the operation was not a warlike one.

Likewise, when the vessel is not a naval vessel at all, the loss is a marine risk loss unless it be proved that the vessel was actually engaged in a warlike operation. In many cases it is obvious that the vessel in question was so engaged. For example, in *British and Foreign Steamship Company, Ltd., v. The King* (1918) 2 K. B. 879, the *St. Oswald* had been requisitioned by the British Admiralty for use as a transport in the evacuation of troops from the Gallipoli Peninsula. While so engaged she collided with another ship. It was there held that the *St. Oswald* was engaged in a warlike

operation at the time of the collision.

In *Yorkshire Dale Steamship Co., Ltd., v. Minister of War Transport*, (1942) A. C. 691, 58 T. L. R. 263, the *Coxwold* had been chartered to the Minister of War Transport of Great Britain and was stranded while proceeding in convoy from Scotland to Narvik, Norway. She was carrying a cargo of petrol in tins for the use of the British Forces in Norway. It was there held that the *Coxwold* was engaged in a warlike operation.

In *Attorney-General v. Adelaide Steamship Co., Ltd.*, (1923) A. C. 292, the *Warilda* was requisitioned for use by the British Admiralty. She collided with another ship while carrying some 600 wounded men and doctors from France to England. At the time the *Warilda* was proceeding at full speed under blackout conditions. It was there held that she was engaged in a warlike operation.

In *Liverpool and London War Risks Assn., Ltd., v. Ocean S. S. Co., Ltd.*, (1948) A. C. 243, the *Priam* was requisitioned by the Minister of War Transport of Great Britain. She was damaged by wind and wave while carrying a cargo, 78.5 per cent of which was war stores, from Great Britain to the British war base in Alexandria. At the time of her damage she was, contrary to peacetime practices, traveling at a high speed through rough seas, zigzagging, and was blacked out. It was there held that the *Priam* was engaged in a warlike operation.

We submit that it is impossible to liken the *Roustabout* to the *St. Ostwald* engaged in the perilous evacuation of troops from the Gallipoli Peninsula, to the *Coxwold*, proceeding through the dangerous waters of the North Sea carrying gasoline for the use of British combat troops in Norway, to the *Warilda* carrying wounded men directly from the battlefields of France across the English Channel to England, nor to the

Priam, carrying its cargo of war stores to the British Forces in Africa.

Leading cases in which it was held that the vessel in question was not engaged in a warlike operation are:

Britain S. S. Co., Ltd., v. The King, (1921) 1 A. C. 99;

Green v. British India Steam Nav. Co., Ltd., (1921) 1 A. C. 99;

Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co., 263 U. S. 487, 68 L. ed 402 (1923).

In *Britain S. S. Co., Ltd., v. The King*, supra, the *Petersham* was in charter to the British Admiralty. It was lost in consequence of a collision while steaming in convoy without lights on a voyage from Bilbao to Glasgow, Scotland, with a cargo of iron ore. It was there held that the *Petersham* was not engaged in a warlike operation.

In *Green v. British India Steam Nav. Co., Ltd.*, supra, the *Matiana* was stranded while sailing from Alexandria for a British port with a cargo of cotton. She was sailing in a convoy under an escort of four naval vessels on a course not sailed in peacetime. It was there held that the *Matiana* was likewise not engaged in a warlike operation.

In *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, supra, the *Napoli* was sailing from New York for Genoa, Italy, with a cargo of contraband material for the Italian Government. At Gibraltar she joined a convoy commanded by an Italian naval officer and escorted by British, Italian and American naval vessels, all of the ships in the convoy sailing without lights and zigzagging. The convoy in which the *Napoli* was sailing met another convoy and in the resulting confusion the *Napoli* collided with a ship in the other convoy and was sunk. (The facts of this case are taken

from 278 Fed. 770.) It was held in the trial court that the *Napoli* was not engaged in a warlike operation and the decision that the loss was not a war risk was affirmed by the United States Supreme Court.

If the *Petersham*, the *Matiana*, and the *Napoli* were not engaged in warlike operations, then, we submit, the *Roustabout* was a fortiori not so engaged. The *Petersham* was steaming without lights in submarine-infested waters; the *Matiana* was sailing without lights in a convoy under naval escort in waters made hazardous by submarines, and the *Napoli* was sailing without lights in a convoy under Italian command, escorted by British, Italian and American naval vessels and with a cargo, entirely contraband, and consisting in part of actual munitions of war. In each case, however, the ship in question was held not to have been engaged in a warlike operation.

Can it be urged that the *Roustabout* would have been held to have been engaged in a warlike operation by the courts which decided the *Petersham*, the *Matiana* or the *Napoli* cases? She was not sailing in convoy; she was not under naval escort; she was not in hostile waters; she was not blacked out, and she was not carrying a warlike cargo. In short, she lacked every characteristic which could have supported a decision that the *Petersham* or the *Matiana* or the *Napoli* was engaged in a warlike operation.

It is to be noted, too, that the *Roustabout* was no more subject to orders of governmental authorities than was the *Petersham*, for that vessel was operating under charter to the British Admiralty at the time of its collision.

At the trial of this matter, appellees sought to prove the character of the dry cargo, if any, of the *Roustabout* at the time of her collision by introducing evidence as to the character of cargo which she had from

time to time carried southward. It will be readily recognized that such evidence is incompetent for that purpose. The court, however, found as follows: (Ap. 48)

“... that on southbound trips from said naval bases in the Territory of Alaska the said *U.S.S. Roustabout* engaged in carrying cargo consisting of freight offered by the Navy or Coast Guard, empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles, and at the time of said collision, the said vessel had aboard water ballast and miscellaneous dry cargo of the nature just above described.”

As to the finding concerning the cargo which was actually aboard the *Roustabout* at the time of the collision, it is conceded by all that she was proceeding in ballast. As to the dry cargo, however, which she had aboard, the only direct testimony as to the nature of that cargo was given by Lawrence A. Parks, the Captain of the *Roustabout* at the time of its collision. His testimony upon cross-examination was as follows: (Ap. 110)

Q. And the vessel at that time had only aboard water ballast to make navigation of it convenient and some miscellaneous dry cargo which you had picked up at these various ports?

A. That is right.

Q. Dry cargo which probably was primarily oil drums and containers of that type and miscellaneous things that they wanted returned to Seattle?

A. That is right.”

This is the only testimony in the record concerning the character of the cargo, if any, actually being carried by the *Roustabout* at the time of its collision, and it is testimony merely that such cargo was *probably* aboard.

It is hence to be seen that there was clearly a failure of proof as regards the identity of the cargo, if any, of the *Roustabout* at the time of its collision, and the finding of the trial court as to the character of that cargo is hence not supported by the evidence.

Even if it were to be accepted that what was "probably" aboard was as a matter of fact actually aboard, it is clear from the decided cases that a vessel carrying such cargo is not engaged in a warlike operation. For example, in *Clan Line Steamers, Ltd., v. Board of Trade*, (1929) A. C. 514, the *Clan Matheson* was bound from New York to Nantas with a cargo of which 84 per cent consisted of civilian stores and 16 per cent was for the military authorities. It was there held that the *Clan Matheson* was not engaged in a warlike operation despite the fact that a considerable part of its cargo consisted of materials which were admittedly for use by the military authorities at its destination.

In *Harrisons, Ltd., v. Shipping Controller*, (1921) 1 K. B. 122, the *Inkonka* ran aground while carrying hospital stores for the British government and a few British troops from Salonica to Taranto in Italy. It was there held that the *Inkonka* was not engaged in a warlike operation.

Here again it should be pointed out both the *Clan Matheson* and the *Inkonka* had been requisitioned by the British Admiralty and hence were operating under its orders just as much as the *Roustabout* was acting under the orders of the U. S. Navy. Despite that fact, the courts made no reference to the requisitioning of those vessels as tending to support the view that they were engaged in warlike operations.

We submit that the *Roustabout*, when returning to Seattle from Sitka in ballast, was engaged in a far less warlike operation than the *Clan Matheson* or the *Inkonka*, even though the evidence in the trial below

were capable of supporting a finding that the *Roustabout* was then carrying a dry cargo of the type enumerated by the trial court in its findings.

It is clear from the cases that, even had the *Roustabout* been carrying a damaged airplane, the most warlike of its possible cargo, she would, nevertheless, have not been engaged in a warlike operation. In *Clan Line Steamers, Ltd., v. Liverpool & London Insurance Assn.*, (1943) K. B. 209, 58 T. L. R. 369, the *Clan Stuart* collided with the *Orlock Head*, which was proceeding from England to France with a cargo which consisted principally of steel rounds intended for the making of shells to be used by the French army. It was there held that the carriage of such material was not a warlike operation. The court said in that case at 58 T. L. R. 371:

“The cargo was not a cargo of military equipment or stores. The cargo would be useless to an army. It was not destined for an army. It was not being taken to an army, or to any place where it was to be available for an army. Is it possible to regard the voyage as a warlike operation, or as part of a warlike operation, merely because the cargo was intended to be of use in future operations after it had been turned into shells?”

It can be said with equal force that a damaged airplane being returned to the United States for salvage was not being taken to an army, nor to any place where it was to be available for an army. In its damaged condition it would, as a matter of fact, have been useless to an army.

In *Nordling v. Gibbon*, 62 F. Supp. 932 (1945 S. D. N. Y.) the *Cassimir* collided with another vessel and was sunk at a time when she was sailing from Cuba to Baltimore with a cargo of Cuban invert molasses which was owned by the Defense Supplies Corporation, an instrumentality of the United States government.

This cargo of molasses was to be distilled into alcohol for the manufacture of smokeless powder and other war materials. At the time, the *Cassimir* was completely blacked out. It was there held that the *Cassimir* was not engaged in a warlike operation. At Page 1083 the court said:

“... although the cargo was ultimately intended to become a part of munitions of war, the carriage of it would not be a warlike operation unless such cargo at the time of the occurrence was of such kind as to be then capable of use by the armed forces. That it had to be processed, as here, first into alcohol, and then into smokeless powder, would be too remote.”

It is submitted that the carriage of damaged equipment back to the United States for salvage is no less remotely a warlike operation than the carriage of materials required in the manufacture of steel shells or smokeless powder.

It might be urged here that the *Roustabout* was engaged in a warlike operation when sailing southward by virtue of the fact that she may arguably have been so engaged while sailing northward. This argument, however, fails in two respects. It is in the first place extremely doubtful that the *Roustabout* was engaged in a “warlike operation” within the contemplation of that phrase in a policy of marine insurance, even when she was proceeding northward. Her cargo of petroleum products was used, not by combatant forces, but simply by patrol planes and boats in the Southeastern Alaska sector, an area some 2,000 miles from the nearest enemy-held territory. When proceeding northward, as when proceeding southward, the *Roustabout* sailed in the protected waters of the Inside Passage. She sailed without escort and with navigation lights burning brightly. She had for her assistance all the peacetime navigation aids. She sailed alone and without

zigzagging and finally, as was testified to by the captain of the *Roustabout* (Ap. 108) not only was the *Roustabout* never subject to enemy attack, but neither an enemy plane nor an enemy vessel was ever sighted.

Even if it be held that the *Roustabout* was engaged in a warlike operation while proceeding northward, it is clear from the decided cases that the character of her southward voyage was not ipso facto also a warlike operation.

The House of Lords case of *Larrinaga Steamship Co., Ltd., v. Regem* (1945) A. C. 246, 61 T. L. R. 241, is precisely in point. In that case the *Ramon de Larrinaga* had been requisitioned by the Crown and had made two trips from England to British war bases in France with cargoes for military use. After having discharged her second cargo at a French port, the ship was ordered to leave that port at once in order to join a convoy at a specified place for the purpose of returning to England. While carrying out those orders, the vessel was stranded. In that case the House of Lords held that the *Ramon de Larrinaga* was not engaged in a warlike operation upon her return voyage even though she was admittedly so engaged while bound from Britain for France.

In that case Lord Peter said at 61 T. L. R. 243:

“There is abundance of authority in your Lordships’ House that a ship engaged in carrying war stores from one war base to another, or indeed in carrying war stores to a war base, is engaged on the warlike operation of proceeding through the water to her appointed discharging port. For this proposition it is sufficient to cite the authorities referred to in *Yorkshire Dale Steamship Company, Ltd., v. Minister of War Transport (The Coxwold)*, (58 T. L. R. 263 [1942] A. C. 691).

While, then, the *Ramon de Larrinaga* was pro-

ceeding to Nantes or to St. Nazaire laden with war stores, she was engaged in a warlike operation and a loss consequent on so proceeding would be a war loss. But that is not the position in which the damage occurred. The vessel had completed her discharge and was on her way to undergo her off-survey with a view to terminating the requisition and charter. None of the decided cases has gone so far as to declare such a voyage a warlike operation, nor do the principles on which they were decided require any such result. It was sought to support the appellants' argument by speaking of a round voyage or a voyage out and home as being part of the same operation, and contending that the whole voyage must be included among warlike operations if part was of that character . . .

The error in the general argument consists, I think, in looking on a round voyage or a voyage out and home as necessarily partaking of the same character throughout. This is not so; indeed, the appellants were constrained to admit that if the *Ramon de Larrinaga*, instead of being sent home in ballast, had been sent on a commercial voyage, she would have ceased the carrying out a warlike operation, yet, being so occupied, she might be proceeding on some portion of a round voyage or on the homeward part of a voyage out and home. For the purpose of the contractual relations between owners and charterers an agreement to perform a round voyage or a voyage out and home differs from an agreement to perform a single voyage, but for the purpose of ascertaining whether on a particular portion of the voyage the adventure on which the ship is engaged is warlike or peaceful the difference is immaterial. A voyage in ballast to a home port for the purpose of an off-survey is clearly not a warlike operation, and none the more so though the vessel engaged was performing a warlike operation on her voyage out."

The decided cases also make it clear that the character of any particular voyage is not determined by what may be in store for that vessel subsequent to the loss in question. For example, in *Wharton v. Mortleman*, 57 T. L. R. 514 (C. A. 1941), the *Brandonia*, a merchant vessel, collided with the *Alderpool*, which had been requisitioned by the British government for military service and was proceeding from Tyne to Southampton in England for orders. It was the uncommunicated intention of the Admiralty to employ the *Alderpool* after her arrival in Southampton for the purpose of transporting materials of war for the use of the British army overseas. Despite the fact that the *Alderpool* was to have been used in a warlike operation upon her arrival in Southampton, it was held that she was not engaged in a warlike operation at the time of the collision.

Ard Coaster, Ltd., v. The King, 36 T. L. R. 555 (1920) and *Wynnstay S. S. Co., Ltd. and W. I. Radcliffe S. S. Co., Ltd., v. Board of Trade* (1925) 23 Ll. L. Rep. 278, well illustrate the principle that the character of a vessel's operation is determined by the circumstances of the vessel and voyage at the time of loss.

The *Atheltemplar* was a tanker which had been requisitioned by the Ministry of War Transport of Great Britain. The *Sylvan Arrow* was a tanker which had been requisitioned by the government of the United States and was "a unit of the United States Navy for the carriage of fuel for war vessels." Both vessels were damaged by collision with another vessel while at anchor, but in one case the loss was held to have been a marine risk loss, whereas in the other case the loss was held to have been a war risk loss. In the case of the *Atheltemplar*, that vessel had left Trinidad for Scapa Flow with a cargo of fuel oil. At the time of her loss she was anchored in the harbor of Lochalsh in

Scotland. In the case of the *Sylvan Arrow*, that vessel had returned in ballast and at the time of collision was prepared to take on more oil. In the latter case it was held that the *Sylvan Arrow* was not engaged in a warlike operation, whereas in the former case it was held that the *Atheltemplar* was engaged in a warlike operation since she was still on her voyage to Scapa Flow.

We submit, therefore, that the trial court was in error in finding that the *Roustabout* was engaged in a warlike operation. Upon the authority of the decided cases, she was plainly not so engaged and the loss incurred by the *Eastern Prince* must hence fall upon the marine rather than war risk underwriter.

b. The Collision Between the Eastern Prince and the Roustabout Was Not Proximately Caused by a Warlike Operation and the Loss Was Hence Not a War Risk Loss.

Specification of Error: 2. The court erred in its conclusion of law that the collision and damage resulting therefrom to libelants' vessel, the *M.V. Eastern Prince*, was a consequence of warlike operations of the *U.S.S. Roustabout*.

Specification of Error: 3. The court erred in its conclusion of law that the collision between the *M.V. Eastern Prince* and the *U.S.S. Roustabout* was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the *M.V. Eastern Prince* and that libelants were entitled to judgment against respondent upon that policy of insurance.

It is the contention of the appellant that the *Roustabout* was not engaged in a warlike operation at the time of her collision with the *Eastern Prince*. Even if she had been so engaged, however, the resultant loss would not have been a war risk loss since that loss was not proximately caused by the warlike operation.

The many cases already cited, which have held that a loss was a marine risk loss, even though occurring during the course of a war, demonstrate that a collision *in* wartime is not the equivalent of a collision in consequence of a warlike operation.

The necessity for a casual relationship between the warlike operation in progress and the loss incurred may best be illustrated by *Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport* (1942), A. C. 691, 58 T. L. R. 263. In that case the *Coxwold* was proceeding in convoy and was carrying petrol for use of the British forces in Norway. While so operating the *Coxwold* ran aground. Prior to the loss the convoy had made an alteration in its course in order to avoid what was thought to be an enemy submarine. Had this alteration in course not been made the *Coxwold* would not have gone aground. In that case the Lord Chancellor said at 58 T. L. R. 264:

“It has been laid down that a vessel like the *Coxwold*, which was carrying munitions of war from one war base to another, is ‘engaged in a warlike operation’ and this was expressly admitted by the respondent in the present case. This, however, is an entirely different thing from saying that any and every accident which happens to such a ship during her voyage is the consequence of a warlike operation. To suggest the contrary would be just as illogical as to say that if a postman, while engaged in the operation of delivering letters, meets with an accident in the street, this is necessarily the proximate consequence of his delivery of letters.

“Authority is hardly needed for the proposition that you do not prove that an accident is ‘the consequence of’ a warlike operation merely by showing that it happened ‘during’ a warlike operation. For example, if a commercial vessel while proceeding from one war base to another with munitions on board is destroyed while at sea by acci-

dental fire, the cause of which is quite unconnected with the nature or method of her journey or the nature of the cargo she carried, I should suppose that it could not be said that her destruction was proximately caused by the warlike operation. So with collision. Lord Justice Crutton was plainly right when he said in *Clan Line Steamers v. Board of Trade* (44 T. L. R. 784 at page 786; [1928] 2 K.B. 557 at page 567) that ‘the question to be decided is: Was the collision a consequence of a warlike operation—not, did it happen in the course of a warlike operation; not is a warlike operation one of the events which in their totality contributed to the collision, but was the collision a consequence of a warlike operation in the sense in which that expression is understood in insurance matters?’ If Lord Dunedin’s use of the syllogistic form in *Attorney General v. Ard Coasters* (37 T. L. R. 692 at page 695; [1921] 2 A.C. 141 at page 152) were to be understood as stating that anything that happens during a warlike operation is a consequence of it, that passage contains a slip in reasoning, and is no essential part of the decision. Lord Sumner, in *The Warilda* (39 T. L. R. at page 336, [1923] A.C. 292 at page 305) put the true test when he asked whether the collision was caused ‘effectively and proximately’ by the warlike operation.”

At page 265 the Lord Chancellor concluded:

“ . . . where the finding is that so substantial a deviation from the normal course was ordered for the express purpose of avoiding an enemy submarine, and was not subsequently corrected, there is no reason for saying that the arbitrator, in finding that the loss was the direct consequence of a warlike operation, was disregarding what had already laid down by this house.”

Lord MacMillan said at page 266:

“It is agreed that the *Coxwold* when she ran aground on the coast of Skye was engaged in a warlike operation. But to place liability on the

Minister it is not enough that the casualty arose in the course of a warlike operation. It must also arise out of and be proximately caused by the warlike operation."

Lord Porter said at page 270:

"In the present case it has been thought by the Court of Appeal, as I understand them, that the arbitrator found the sole, or at any rate the dominant, cause of the loss to be an unexpected set of the tide, and that such a cause was a definite external event unconnected with the warlike operation. I do not so understand him. One must, I think, take the whole story—a ship sailing on a warlike operation at a speed in dangerous waters where unexpected currents might be found, in convoy without lights, following an ordered course and deviating from it again under orders for the purpose of avoiding actual or imagined submarine attack."

The Moor Line, Ltd. v. Isaac King et al., 4 Ll. L. Rep. 286 (K. B. 1920) very neatly demonstrates that a loss is not a war risk loss unless it was incurred because of the war operation. In that case the *Exmoor* swerved to avoid a floating mine and was stranded. Normally such a stranding would be held to be a war risk loss. As the evidence revealed, however, the *Exmoor* would have run aground had she not swerved, but had continued on her course, and the court held that on those facts the loss was a marine risk loss. In other words the court held that the loss was not a war risk loss since it would have occurred in the absence of the warlike element present in the factual situation.

In the case of the collision before this court the only possible warlike element was the nature of the "probable" cargo of the *Roustabout*. That "probable" cargo, however, in no respect caused the collision nor even increased the likelihood of that occurrence.

The requirement that a loss must be proximately caused by a warlike operation in order for that loss to be a war risk loss is best demonstrated by *Liverpool and London War Risks Assn. v. Ocean Steamship Co., Ltd.* (1948) A. C. 243. In that case the *Priam*, which had been requisitioned by the British Minister of War Transport, was dispatched from Britain to the British war base in Alexandria by way of the Cape of Good Hope. Her cargo of 6846 tons was 78.5% war stores. On her deck was stowed such war cargo as airplanes and a bridge-laying tank. Contrary to peacetime practice the *Priam* took a course directly out into the North Atlantic and zigzagged while under way. She then ran into heavy weather but, contrary to peacetime practice, continued to zigzag and maintained a much higher speed than she would have maintained in the absence of the menace of submarines. While the *Priam* was so steaming (1) her deck cargo came adrift and damaged the vessel, (2) water entered the fore-peak, causing damage there, and (3) water caused damage to the afterwell deck and poop.

On appeal, the House of Lords held that only the damage caused by the deck cargo coming adrift was a war risk loss, the rest being simply a marine risk loss. This decision, which divides the losses suffered by the same vessel at the same time on the same voyage, of course, makes incontrovertible the fact that a loss suffered by a vessel engaged in a warlike operation is nevertheless a marine risk loss unless the warlike operation was the proximate cause of that loss.

In the House of Lords decision Lord Wright said at (1948) A. C. 254:

“While I agree that it is now settled by a number of decisions in this House and last of all in *Yorkshire Dale Steamship Company, Limited v. Minister of War Transport (The Coxwold)* that

a vessel in wartime sailing from one war base to another with a cargo of war stores is engaged on a warlike operation, it has not been laid down except in general terms that every loss which occurs on such a voyage is to be treated as a war loss."

At (1948) A. C. 258, Lord Wright went on to say:

"If the true effect of the F. C. & S. Clause is to exclude every sort of marine damage occurring while the ship was engaged on a warlike adventure then, as it seems to me, the marine policy is simply otiose during that adventure. But no one has gone so far as that."

The *Priam*, of course, sustained all of her damage while she was engaged in a warlike operation. The House of Lords held, however, that the war risk underwriter became liable for only that portion of the loss which was proximately caused by the warlike operation, i.e., the breaking adrift of the war materials stowed on deck.

As regards causation the English cases have been made somewhat ambiguous by dicta to the effect that every loss incurred in the course of a warlike operation is ipso facto a war risk loss. For example, in *Attorney General v. Adelaide S. S. Co. Ltd.* (1923) A. C. 292, Lord Sumner spoke to that effect. In the *Priam* decision, however, Lord Wright said at (1948) A. C. 259:

"It is now clear that Lord Sumner's dictum ([1923] A. C. 292) that as was the whole, so were the parts cannot be applied without qualification."

The American cases, however, are not equivocal as regards the element of proximate cause. In an unbroken line of cases, dating from *Morgan v. United States*, 81 U. S. 531, 20 L. ed. 738 (1872) to the present time, the American courts have been unanimous in holding the loss to be a war risk loss only if

that loss was proximately caused by a warlike operation.

In *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 68 L. ed. 402 (1923), the *Napoli* was an Italian steamer sailing from New York to Genoa with a cargo of contraband for the Italian Government. At Gibraltar she joined a convoy and thereafter, while sailing in convoy, she collided with a vessel in a westbound convoy. Both convoys were under the command of Italian naval officers. Both were escorted by British, Italian and American naval vessels. All vessels were without lights. About five hours prior to the collision a vessel in the westbound convoy had been torpedoed and that convoy had begun to zigzag. As a result of the zigzagging, that convoy was off of its original course. (Facts from 278 Fed. 770.) Despite all these elements connecting the loss incurred with the operation being carried on, our Supreme Court held that the loss was not a war risk loss. That court, speaking through Justice Holmes, said at 68 L. ed. 402 at 404:

“... the common understanding is that, in construing these policies, we are not to take broad views, but generally are to stop our inquiries with the cause nearest to the loss.”

On the same page the court went on to say:

“... we are dealing not with general principles, but only with the construction of an ancient form of words which always have been taken in a narrow sense, and in *Morgan v. United States* were construed to refer only to the nearest cause of loss, even when there were strong grounds for looking beyond it to military command.”

Since the *Napoli* case, our Supreme Court has not again addressed itself to the question now before this court. The Federal courts which have been confronted with this problem have hence uniformly held, in ac-

cordance with that decision, that a loss, though incurred in a warlike operation, is not a war risk loss unless proximately caused by a warlike operation.

For example, in *Standard Oil Co. v. St. Paul Fire and Marine Insurance*, 59 F. Supp. 470 (S. D. N. Y. 1945), the *Petter* was a Norwegian tanker which was chartered for a voyage from Texas to Havre, France. The *Petter* was convoyed across the Atlantic. After she left the convoy the *Petter* proceeded to Brest and was there allowed by the French authorities to proceed to Havre. Off Havre the master heard a bombardment and put to sea again. Later the *Petter* was anchored off Havre but a French patrol boat came alongside and ordered her to leave as quickly as possible. She was then anchored near Brest until a British patrol boat warned her of the approach of the Germans and suggested that she proceed to Falmouth, England. Upon the arrival of the *Petter* off Falmouth the master signaled for a pilot since the waters of Falmouth Harbor had been mined. A patrol boat flying the British naval ensign signaled the *Petter* to "follow me," and, while obeying that signal, the *Petter* struck a submerged rock and was damaged.

Despite the fact that the *Petter* was clearly engaged in a warlike operation, it was held that the loss was a marine risk loss. The court said at 59 F. Supp. 474:

"It is well settled that the fact that there is a war in progress, or that there are surrounding circumstances of war, in and of themselves, are not sufficient to exclude coverage under a policy containing an F. C. & S. clause, but it must be shown that a cause of loss contemplated by such a clause was the cause 'nearest to the loss.'"

The case of *Ferro v. United States Mail Lines and United States of America*, 74 F. Supp. 250 (S. D. N. Y. 1947), was concerned with a war risk policy of insur-

ance upon an individual rather than upon a vessel. The policy in question insured the decedent "against loss of life . . . directly or proximately caused by risks of war and warlike operations, including capture, seizure, destruction by men-of-war, sabotage, piracy, takings at sea, arrests, restraints and detainments, acts of kings . . ." In that case the decedent committed suicide by jumping overboard at a time when his ship was en route to Australia by way of the Panama Canal. It was there held that there was no causal relationship between the death of the decedent and a warlike operation, and that there could hence be no recovery under the policy.

In *Daronowich v. United States of America*, 73 F. Supp. 1004 (S. D. N. Y. 1947), the ship of the decedent was torpedoed and sunk. The decedent escaped in a lifeboat and was picked up by a mine-sweeper, which transferred him to a coastal rescue vessel, which in turn transferred him to a destroyer. Subsequently the decedent was washed overboard from the destroyer during rough weather. Despite the fact that the destroyer was arguably engaged in a warlike operation, the court said at 73 F. Supp 1006:

"Even if, under most liberal interpretation, it might be considered that the (destroyer) was engaged in a warlike operation while transporting the rescued seaman and that (decedent) lost his life during such warlike operation, there is no evidence justifying the conclusion that his loss of life by being swept overboard, as claimed by libellant, or otherwise, was 'directly occasioned' by the warlike operation."

Two recent American cases, involving vessels rather than persons, reveal that the requirement of proximate cause is not confined to the war risk insurance of individuals. In *Meseck Towing Lines v. Excess Insurance Company, et al*, 77 F. Supp. 790 (E. D. N. Y.

1948), the tug *Meseck* was damaged by a collision with the United States naval vessel S. C. 1294, a sub-chaser, in New York harbor. The tug was covered by a marine risk policy having an F. C. & S. clause. The S. C. 1294 was manned by naval officers and men, and was armed with one 40-mm. and two 20-mm. anti-aircraft guns, approximately twelve 300-pound depth charges and one set of "Mouse-Trap" forward throwers. At the time of the collision the S. C. 1294 was proceeding out of New York harbor to take up her anti-submarine patrol duties south of Ambrose Light Vessel. It was found that the collision occurred through mutual fault.

In this case it was held that the loss was a marine risk loss despite the fact that the S. C. 1294 may have been engaged in a warlike operation at the time of the collision.

Finally, *Atlantic Refining Co. v. United States*, 74 F. Supp. 516, 1948 A. M. C. 94 (1948), concerned the stranding of the *E. H. Blum*, a tanker with a capacity of 19,200 tons and a length of 523 feet. The *E. H. Blum* had been chartered by the United States. At the time of the stranding, the *E. H. Blum* was carrying a load of crude oil from Texas to Philadelphia. She was off course but would have been aware of that fact had not certain peacetime radio beacon lightships been removed because of the war. Because of a provision in the charter party the issue arose as to whether the stranding had been "caused or contributed to by war or warlike acts." The court held that the removal of the radio beacon lightships was a warlike act and that, moreover, that warlike act "contributed" to the stranding of the *E. H. Blum*.

If the circumstances surrounding the *Eastern Prince-Roustabout* collision are examined, it becomes apparent that there was no causal relationship whatsoever between the war or any warlike operation and

the damage suffered by the *Eastern Prince*. Had the collision occurred because one or both ships were proceeding without lights, or because one or more shore navigational aids had been extinguished, or because one or both ships were traveling at a higher rate of speed than would have been normal in peacetime, or because one or both ships were zigzagging, or because one ship mistook the other for an enemy vessel and sought to ram it, then could it be held that the loss was proximately caused by the warlike operation. It is clear from the evidence, however, that the collision in question resulted from no such consequence of war. Neither ship had extinguished its normal peacetime running lights, all aids to navigation ashore were in operation, neither vessel was proceeding at a speed greater than normal, neither was zigzagging, and neither mistook the other for an enemy vessel.

In *John Peters v. The Warren Ins. Co.*, 14 Pet. 99, 10 L. ed. 371, Justice Story, in speaking of marine insurance, said at 14 Pet. 109:

“If there be any commercial contract which, more than any other, requires the application of sound common-sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance; for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions.”

This same sentiment was expressed by Judge Cardozo in *Bird v. St. Paul Fire and Marine Ins. Co.*, 224 N. Y. 47, 120 N. E. 86 (1917). In that case the owner of a vessel sought to recover upon a policy of insurance which covered explosions but not fires. The facts of the case were that a fire broke out under certain railway cars containing explosives. The contents of the cars exploded, causing another fire, and another and much greater explosion took place damaging the

plaintiff's vessel some one thousand feet away. It was held by the court that the damage was done by explosion rather than fire. In discussing the element of causation, Judge Cardozo said at 120 N. E. 87:

"The problem before is not one of philosophy. Pollocks, Torts (Kents ed.) page 37. If it were, there might be no escape from the conclusions of the court below. General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts."

Authority and reason combine to deny that the *Roustabout* was engaged in a warlike operation at the time of the collision in question; yet, even if it be found by this court that the *Roustabout* was so engaged, the most that can then be found is that the loss occurred *during* a warlike operation—and such a finding is insufficient to impose liability upon the war risk underwriter. For the loss to be a war risk loss, it must be found that the loss not only occurred *during* a warlike operation, but that it was *caused* by that warlike operation.

We submit, therefore, that, even if it be found that the *Roustabout* was engaged in a warlike operation, the collision was not caused by that operation and the loss hence cannot be a war risk loss.

c. The Eastern Prince Was Entirely at Fault in the Collision and Hence the Loss Cannot Be a War Risk Loss.

Specification of Error: 6. The court erred in finding that at the time of said collision the *U.S.S. Roustabout* and the *M.V. Eastern Prince* were both at fault.

Specification of Error: 7. The court erred in finding that the said collision occurred by reason of the mutual fault of both vessels..

Specification of Error: 3. The court erred in its conclusion of law that the collision between the *M.V. Eastern Prince* and the *U.S.S. Roustabout* was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the *M.V. Eastern Prince* and that libelants were entitled to judgment against respondent upon that policy of insurance.

As has already been shown in this brief, the loss from a collision between a vessel upon a warlike operation and one upon a peaceful operation falls upon the marine risk underwriter if the vessel upon the peaceful operation was entirely at fault.

The evidence introduced at the trial of this matter cannot support the findings of the trial court that the *Roustabout* and the *Eastern Prince* were both at fault, for that evidence reveals that the *Roustabout* was herself blameless..

The testimony of Captain Parks, who was on the bridge of the *Roustabout* at the time of the collision, was that the only lights visible upon the *Eastern Prince* were three white lights (Ap. 111), and that neither its green nor its red navigating light was visible (Ap. 113). This testimony of Captain Parks as to the lights upon the *Eastern Prince* was corroborated by Marvin S. Beasley, the bow lookout upon the *Roustabout*, who testified that only white lights were visible upon the *Eastern Prince* (Ap. 209), and his testimony was that there were at least half a dozen such white lights burning on the *Eastern Prince* as the *Roustabout* approached her.

The testimony of the men of the *Roustabout* concerning the number of white lights visible upon the *Eastern Prince* was corroborated not only by Dean Mills of the *Eastern Prince*, who testified (Ap. 133) that there were two white lights hanging under the overhang of the bridge, but by Captain Rose of the *Eastern Prince*,

who testified that there were four such white lights (Ap. 169).

On the basis of this evidence the court specifically found that the *Eastern Prince* was at fault for its failure to exhibit red and green navigation lights as required by law (Ap. 49).

Because of this failure of the *Eastern Prince* to exhibit the required running lights, the captain of the *Roustabout* was misled as to the direction in which the *Eastern Prince* was proceeding. As Captain Parks of the *Roustabout* testified (Ap. 119), the lights which the *Eastern Prince* exhibited were precisely the same as the lights exhibited by a vessel being overtaken by the *Roustabout*.

Now when one vessel is overtaking another vessel, the former is required only to keep out of the way of the overtaken vessel. Title 33 U. S. C. A. Sec. 109 provides as follows:

“Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.”

Captain Parks testified (Ap. 113) that as the *Roustabout* got closer to the *Eastern Prince*, he “hailed” the *Roustabout* farther to the left in order to allow more space in passing the *Eastern Prince*. This, of course, was done upon the mistaken assumption that the *Roustabout* was overtaking the *Eastern Prince*—and that assumption was in turn based upon the failure on the part of the *Eastern Prince* to exhibit the statutory running lights.

Had the *Roustabout* actually been overtaking the *Eastern Prince*, the course taken by Captain Parks would clearly have been proper. His only duty was “to keep out of the way of the overtaken vessel,” and this he sought to do by changing his course to port.

In *The Scotia*, 81 U. S. 170, 20 L. ed. 822 (1892) it was held that when the defective lights of one vessel have caused another vessel to be deceived, the latter vessel is without fault if it was properly maneuvered upon that erroneous supposition.

In *Wariang v. Clarke*, 5 How 441, 12 L. ed. 226 (1846), the United States Supreme Court said at 5 How. 465:

“ . . . if a collision occurs between steamers at night, and one of them has not signal lights, she will be held responsible for all losses until it is proved that the collision was not the consequence of it.”

In the present case the *Roustabout* was deceived by the lights of the *Eastern Prince* into thinking that the *Roustabout* was astern of the *Eastern Prince* and that she was overtaking the *Eastern Prince*. Since the *Roustabout* was properly maneuvered as an overtaking vessel, the *Eastern Prince* was alone at fault for the deception upon which the maneuvers of the *Roustabout* were predicated.

The trial court found (Ap. 49) that the *Roustabout* was at fault in “failing within sight of the *Eastern Prince* to indicate a change of course on her whistle.” There is no rule, however, requiring an overtaking vessel to sound its whistle to indicate a change of course. Its only duty is to take steps to avoid the overtaken vessel. Whistle signals come into play when vessels are meeting end on, or nearly so, not when both vessels are on the same course. Title 33 U. S. C. A. Sec. 103 provides as follows:

“When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.”

Under the circumstances contemplated by the foregoing rule, whistle signals, of course, assume great importance, for both vessels are under a duty to change course, and it is hence important for each vessel to know that the other vessel has made the proper change in course. An overtaken vessel, on the other hand, is under no duty to change its course. Rather is it under a duty to maintain its course and speed. Title 33 U. S. C. A. Sec. 106 provides as follows:

“Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.”

Being under a duty to “keep its course and speed,” the overtaken vessel is not concerned with any changes of course on the part of a vessel overtaking it. That latter vessel has merely the duty of avoiding the overtaken vessel and need not signal any course changes it may adopt in doing so.

In the present case the *Roustabout* properly inferred from the absence of running lights on the *Eastern Prince* that that vessel was proceeding in the same direction as the *Roustabout*. Under those circumstances the *Roustabout* was under no duty to sound a whistle signal, and quite plainly the trial court was in error in finding that the *Roustabout* was at fault in failing to indicate a change of course by means of a whistle signal.

The court also found (Ap. 49) that the *Roustabout* was at fault in not keeping to the right of the channel. Now it is true that Title 33 U. S. C. A. Sec. 110 provides as follows:

“In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.”

It may also be admitted that the *Roustabout* was to the left of mid-channel, but that is not to admit that the collision was the result thereof.

Had the *Eastern Prince* exhibited its proper lights, the *Roustabout* would, of course, have perceived that the *Eastern Prince* was an oncoming vessel and would have changed its course to starboard in order to pass that vessel port to port. Because of the failure of the *Eastern Prince* to exhibit the proper running lights, however, the *Roustabout* was justified in concluding that the *Eastern Prince* was being overtaken by the *Roustabout*. On the basis of that justifiable conclusion, the *Roustabout* then had but one duty as regards the *Eastern Prince*, and that was the duty of avoiding her. The *Roustabout* was, under the rules, at liberty to pass to the starboard of the overtaken vessel or to her port just so long as the *Roustabout* kept out of the way of her.

Since the justly famous opinion of Judge Cardozo in the case of *Palsgraf v. Long Island Railway*, 248 N. Y. 339, 162 N. E. 99 (1928), it has been clear that there cannot be "negligence in the air." Negligence must be directed toward someone or some thing. The *Roustabout* would clearly have been negligent in not keeping to the starboard side of the channel had there been a vessel, known to the *Roustabout* as oncoming, for in that case the *Roustabout* would have been negligent toward that particular vessel.

Now, however, when the only other ship in the area was a ship which appeared not to be oncoming but rather to be proceeding in the same direction, the *Roustabout* was not at fault in not keeping to the starboard of mid-channel for, to the *Roustabout*, the overtaken vessel was herself keeping to the port of mid-channel, and the *Roustabout*, as regards that vessel, had only the duty of avoiding her.

Finally, the court found (Ap. 49) that the *Roustabout* was negligent in "failing to keep a proper lookout in that the lookout aboard the *Roustabout*, after sighting the red light of the *Eastern Prince*, took no action concerning same and failed to notify the officer on the bridge of the whereabouts of the *Eastern Prince*."

The very statement of this finding makes plain the fact that fault upon the part of the *Roustabout* cannot be predicated upon that finding. The captain of the *Roustabout* at all times knew the "whereabouts" of the *Eastern Prince*. His testimony was that he had seen the white lights of the *Eastern Prince* for some time prior to the collision, so that the likelihood of a collision would not have been lessened in the least had the bow lookout reported to the bridge the location of the other vessel in reference to the *Roustabout*. The captain was fully aware of the presence of that other vessel and its location. The only thing that he did not know was the course of that vessel.

The finding of the court was that there was fault on the part of the *Roustabout* because of the failure of its lookout to report the "whereabouts" of the *Eastern Prince*. We believe that finding cannot be interpreted to mean that the *Roustabout* was at fault in the failure of the lookout to report the "course" of the *Eastern Prince*. But, even if it be so interpreted, a finding of fault on the part of the *Roustabout* can no more be based upon the failure of the lookout to report the course of the *Eastern Prince* than it could be based upon the failure of the lookout to report the "whereabouts" of the *Eastern Prince*.

It is true that the *Roustabout* would have been at fault had its lookout been able to see the red running light of the *Eastern Prince*, as the *Roustabout* approached her, but had yet failed to notify his captain

of that fact. As testified to by the lookout, and as found by the court, however, no running light on the *Eastern Prince* was exposed to the view of the *Roustabout* as the two ships closed the water between them. The lookout testified that the only lights that were visible to him were white in color (Ap. 209). Since he could at that time see only white lights, he would, of course, have been in error in reporting that he had sighted a red light on the other vessel.

When the *Eastern Prince* changed its course so as to expose its red port running light to view, Captain Parks testified (Ap. 116) that he put the engines full speed astern and his ship's rudder hard left.

The bow lookout first became aware of the true course of the *Eastern Prince* when its change of course exposed its red port running light. At the same time, however, the captain of the *Roustabout* became aware of that true course of the *Eastern Prince*. There is no showing that Captain Parks would have given any engine orders or rudder commands other than the ones which he actually gave had he received a report from the bow that the other vessel's red port running light was visible. Such a report would only have corroborated that which he already well knew. Had the captain not have seen the red light when it was exposed by the change in course of the *Eastern Prince*, or had he mistaken that red light for a green light, or had he been doubtful as to whether that red light was a red port running light, then the failure on the part of the lookout to report that light would have been significant. In the present case, however, such a report would have had no effect other than to distract the captain of the *Roustabout* from his emergency efforts to avoid collision with a vessel which had, by its change in course, revealed itself suddenly and without warning as being,

not an overtaken vessel, but as a vessel proceeding in the opposite direction.

Unless it can be found that the captain of the *Roustabout* would have taken any steps different from those which he actually took had the bow lookout reported the sighting of the red port running light of the *Eastern Prince*, then fault on the part of the *Roustabout* cannot be founded upon the failure of the lookout to make such report.

Fault in the collision in question must be wholly attributed to the *Eastern Prince* for its failure to exhibit the lights required by statute. The *Eastern Prince* and only the *Eastern Prince* was at fault when her running lights were not visible. When, by a change in course, she finally exhibited those lights, the two vessels were in such a position of peril that even the emergency engine order of "full speed astern" and the emergency rudder command of "hard left rudder" given by Captain Parks were ineffective to avoid the collision which had been made almost inevitable by the deceptive appearance of the *Eastern Prince*.

We, therefore, submit that the *Eastern Prince* was alone at fault in the collision of the two vessels in question and that upon the principles already established in this brief the resultant loss was a marine risk loss rather than a war risk loss.

IV.

The Court Was in Error in Granting to Appellees Interest Upon Their Judgment From the 11th Day of September, 1942.

Specification of Error: 8. The court erred in granting to appellees interest upon their judgment from the 11th day of September, 1942, rather than from the date of entry of the final decree in this cause.

It is now well established in Admiralty suits arising out of collisions that it is discretionary with the trial

courts to grant interest upon a judgment from the time of its entry, from the time of the original collision or from some intermediate date.

In 1 Benedict on Admiralty, Section 419, it is said:

“In Admiralty . . . the allowance of interest on damages in cases of collision or other unliquidated damages, is always in the discretion of the court and such interest may be allowed or disallowed by the District Court or on appeal by the Circuit Court of Appeals or by the Supreme Court.”

In *The Scotland* (1885) 118 U. S. 507, 30 L. ed. 153, the Supreme Court said at 118 U. S. 518:

“The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass on the subject, whether it be a court or a jury.”

We submit that in the present case there are such facts and circumstances which would make inequitable and unjust a decree ordering the appellant to pay interest to the appellee from the date of the original collision.

The collision in question occurred on May 11, 1942, but the trial of the action was not brought on for hearing until July 16, 1947, over five years from the time that the cause of action arose. After that time the trial court took the matter under advisement and it was not until February 24, 1948, that the Findings of Fact and Conclusions of Law were signed. The final decree was not filed until May 20, 1948, or a period of six years since the date of the original collision.

If the appellant could be held responsible for the elapse of time between the collision in question and the entry of the final decree, it might be conceded that the granting of interest to the appellees from the date of that collision would not be inequitable. We submit,

however, that the responsibility for the long period of time intervening between the time the cause of action arose and its final determination cannot be placed upon the appellant.

After the collision on May 11, 1942, the record shows that the libelants filed their libel on September 17, 1942. Thereafter, on November 7, 1942, Respondent's Exceptions to the Sufficiency of the Libel was filed.

The Exceptions of Respondent were not noted down for hearing by the libelants until January 3, 1944. At that time the court granted the Respondent's prayer that certain portions of the Libelants' Libel be stricken. At the same time the court took under advisement the sufficiency in law of the libel and the necessity of the libelants joining one O. L. Grimes as an additional party libelant. On January 18, 1944, counsel for respondent stipulated that the libelant might add the said O. L. Grimes as an additional party libelant. The hearing which had begun on January 3, 1944, was continued on January 24, 1944, and was continued to January 31, 1944, at which time the argument was concluded and the matter was taken under advisement by the court. On April 12, 1944, counsel for respondent stipulated that the libelants might file an amended libel and such was thereafter filed by libelants. After the filing of the amended libel the court asked for re-argument and the exceptions of the respondent were argued by counsel on May 11, 1944. On May 31, 1944, the court held that the amended libel stated a cause of action.

Thereafter, on September 8, 1944, the respondent filed its answer to the amended libel of the libelants. By filing its answer, the respondent thereby shifted back to the libelants, the moving parties, the responsibility of going forward with the action. In the meantime, various negotiations were taking place among

the libelants, the respondent, and the United States in an effort to reach a settlement satisfactory to all parties. Because of the pendency of these negotiations and the possibility of a mutually satisfactory settlement, libelants asked on October 7, 1946, that this case not be set for trial, but the courts nevertheless set the case down for trial on December 10, 1946.

This recital of the pertinent dates and events which have occurred since the collision in question establishes, we believe, that the respondent was not at fault and, therefore, should not be penalized for the delay which has occurred in the final determination of this controversy. Admittedly, the libelants would have a claim for interest from the time of the collision in question had they promptly noted down for hearing the exceptions of the respondent to their libel and had they promptly brought on for trial this action after the respondent had filed its answer to their libel. As it was, however, there was a delay of over a year between the times that the respondent filed its exceptions to the sufficiency of the libel of the libelants and the time that those exceptions were brought on for hearing. At the same time between September 8, 1944, the time that respondent filed its answer to the libel, and the trial of this action there elapsed almost three years.

At all times the libelants were in command of the conduct of the action. After the respondent had filed its exceptions respondent was without power to delay the hearing of those exceptions. In the same manner, after the respondent had filed its answer to the libel, it was without power to prevent the libelants from bringing the matter on for trial. That the libelants did not seek a more speedy determination of this matter indicates beyond question, we believe, that they considered it to be in their best interests to continue the negotiations which were in progress.

In the determination of whether interest should be granted to the libelants from September 11, 1942, or from the date of entry of this final decree, this court is again confronted with a factual question. There are on one hand cases which would support the granting of interest from the date of collision or from the date of demand. On the other hand there are many cases holding that interest should be granted only from the date of entry of final judgment. In this case, however, we submit that the long delay between the date upon which the cause of action arose and the entry of the final decree is more than adequate reason, in light of the fact that that delay was not due to the fault of the appellant, for denying to appellees, interest dating from the date of the collision.

V.

The Marine Insurance Underwriters Have Clearly Shown by Their Conduct That It Was Not Their Intent That Cases Such as the Present Should Be Considered War Risk.

As has been shown, language of marine insurance policies is to a very large degree traditional, representing forms of usage which have literally been passed on from generation to generation within the marine insurance industry. It is only with extreme reluctance that these forms are changed, but in the case of both American and British underwriters the F. C. & S. clause was changed in 1942 and 1943, respectively, to eliminate all question of collision such as here involved being considered as a war risk.

In the statement of the Overall War-Marine Risk Settlement Agreement (1945 A. M. C. 1014), this situation is summarized as follows:

“The use of that clause (referring to the old form of F. C. & S. Clause) which dated from 1883, was generally discontinued in London in 1942-

1943 pursuant to an announcement of a new British Ministry of War Transport on November 15, 1942. (1943 A. M. C. 130). The 1942 British F. C. & S. Clause became effective on November 21, 1942, at and after noon, Greenwich Meridian Time, for all renewals of current policies and for all new underwritings in London.

Its use was generally discontinued in the New York market in 1943 pursuant to the announcement by the U. S. War Shipping Administration of the 'Wartime-hull Insurance Agreement (1943)' in April, 1943, which included a new 'American F. C. & S. Clause (1943).' The 1943 American Hull F. C. & S. Clause, effective on December 1, 1943, at 12:01 a.m. Eastern War Time, for all renewals of current policies and for all new underwritings in the U. S. A. (Note: A similar new American Cargo F. C. & S. Clause came into use on July 1, 1943.)

The ambiguities of the old clause, and the uncertainties and dissatisfactions resulting from its interpretation by the courts in the United States and in England, gave rise to many disputes which were temporarily handled by advances made without prejudice either by War Risk Underwriters, by the Marine Risk Underwriters, or 50-50 by both, pursuant to agreements known as the Missing Vessel Supplemental Agreements. The Overall Agreement provides for the postponed solutions of such cases."

The British Ministry of War Transport and the War Shipping Administration of the United States, in conjunction with the marine insurance industry, revised these clauses in 1942 and 1943 (1943 A. M. C. 130) (1945 A. M. C. 1035 and 1036).

The British revision in 1942 of the F. C. & S. clause was as follows:

"Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the

consequences of hostilities or warlike operations, whether there be a declaration of war or not; *but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power;* and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom or piracy." (Italics ours)

In the case of the American clause, the revision was made more extended and specific, as follows:

"Unless physically deleted by the underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the policy:

1. Notwithstanding anything to the contrary contained in the policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the vessel, by requisition or otherwise, whether in time of peace or war, and whether lawful or otherwise, also from all consequences of hostilities or warlike operations (whether there be declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

2. For the purpose of this warranty the term "consequences of hostilities or warlike operations" shall be deemed to include the following:

a. Collision caused by failure, in compliance with wartime regulations, of the insured vessel

or any vessel with which she is in collision to show the usual full peacetime navigation or anchorage lights.

b. Stranding caused by the absence of lights, buoys or similar peacetime aids to navigation consequent on wartime regulations.

c. Stranding caused by the failure of the insured vessel to employ a pilot in waters where a pilot would ordinarily be employed in peacetime but in which the employment of a pilot is dispensed with in compliance with military, naval or other governmental orders, or with a view to avoiding imminent enemy attack.

For the purpose of this paragraph (2) any such failure to show lights, or absence of lights, buoys or similar peacetime aids to navigation, or failure to employ a pilot, shall be presumed to be the cause of the collision or stranding unless the contrary be proved, and stranding shall include sinking consequent upon stranding or contact with any part of the land.

d. *Collision with another vessel in the same convoy or collision with any military or naval vessel, that is to say, a vessel manned by and under the control of military or naval personnel and designed to be employed primarily in armed combat service.* (Italics ours)

e. Stranding, collision or contact with any external substance other than water (ice included) as a result of deliberately placing the vessel in jeopardy in compliance with military, naval or other governmental orders in order to avoid imminent enemy attack, or as an act or measure of war taken in the actual process of embarking or disembarking troops or material of war.

3. *The fact that the insured vessel or any vessel with which she is in collision is carrying troops or military or other supplies or is proceeding to or from a war base, or is manned or operated by military or naval personnel, shall not alone be*

sufficient to exclude from this policy any claim which is not excluded under the terms of Paragraph (2) above. (Italics ours)

4. Where by reason of any of the foregoing provisions damage sustained by the insured vessel in collision would not be payable under this policy, it is understood and agreed that liability of the assured for damage caused in such collision shall not be covered by the Collision Clause in this policy.

If war risks are hereafter insured by endorsement on this policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

Under either of these clarifications of the F. C. & S. clause there would not be the slightest question that the present case would be entirely excluded as a war risk.

We respectfully submit that the court should give full consideration to the action of the industry in this instance. The changes made in the F. C. & S. clause clearly reflect the considered thought of the marine insurance industry that it was never intended that a collision such as the present one should be considered a war risk loss.

CONCLUSION

We, therefore, respectfully submit that the trial court was in error in each of the particulars assigned by appellant as error and that the decree of the lower court should be reversed.

Respectfully submitted,

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No. 12001

UNITED STATES
Court of Appeals
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GENERAL INSURANCE COMPANY OF AMERICA,
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Appellant,

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Appellees.

BRIEF OF APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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NORTHERN DIVISION

HONORABLE ROGER T. FOLEY, *Judge*

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UNITED STATES
Court of Appeals
FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation,

Appellant,

vs.

HENRY O. LINK, E. W. ELLIOTT and O. L. GRIMES,

Appellees.

STATEMENT OF THE CASE

This is an appeal from a final decree in admiralty entered in favor of appellees in the United States District Court for the Western District of Washington.

The appellees as libelants below brought this action as assureds under a certain marine insurance policy issued by appellant, General Insurance Company of America, respondent below.

The policy insures the *M/V Eastern Prince* against war risk. The policy specifically insures the risks excluded by the usual F.C. & S. Warranty (F.C. & S. Clause, Exhibit A, R. 22) of a marine policy. Thus the policy insures the *M/V Eastern Prince* against loss and damage as "a consequence of hostilities or warlike operations."

The *M/V Eastern Prince* sustained loss and damage as a result of a collision with the *U.S.S. Roustabout* on May 11, 1942, in the agreed sum of \$11,031.29.

The basic question on appeal is whether the loss and damage so sustained is recoverable under the insurance policy issued by the appellant insuring the vessel against war risk. This is determined by answering the question: Was the loss and damage to the *M/V Eastern Prince* as a result of her collision with the *U.S.S. Roustabout* the consequence of a warlike operation?

On appellant's exceptions to the sufficiency of the libel to state a cause of action, District Judge Bowen overruled such exceptions and held that under the allegations of the amended libel the loss and damage to the *M/V Eastern Prince* was covered by the war risk policy issued by appellant. Judge Bowen further found (1) the *U.S.S. Roustabout* at the time of collision was engaged in a warlike operation and (2) the loss and damage occasioned to the *M/V. Eastern Prince* was a consequence of the warlike operation in which the *U.S.S. Roustabout* was then engaged. See *Link, et al v. General Insurance Company of America*, (D.C. Wash. 1944) 56 F. Supp. 275, 1944 A.M.C. 727; 77 LL.L. Rep. 431 (England).

The case came on for trial on July 16, 1947, before District Judge Roger T. Foley, who, finding in favor of the

appellees, concluded (1) that the loss and damage to the *M/V Eastern Prince* occasioned by collision with the *U.S.S. Roustabout* occurred by reason of the mutual fault of both vessels (2) that the *U.S.S. Roustabout* at the time of collision was engaged in a warlike operation and (3) that the loss and damage to the *M/V Eastern Prince* so occasioned was a consequence of a warlike operation and hence covered under the war risk policy issued by appellant insuring risks excluded by the F.C. & S. clause.

The facts of the case with respect to the character and services of the *U.S.S. Roustabout*, her functions and war duties, are simple and not in serious dispute and may be briefly stated as follows: The *U.S.S. Roustabout* was a duly commissioned Naval Tanker of the United States Navy, manned by Commissioned Officers and enlisted personnel of the United States Navy, armed with a 3-inch gun on the stern; two 50-caliber machine guns on the bridge, and two 20-millimeter guns forward. She was engaged in a continuous shuttle service carrying petroleum products between Naval war bases of supply in Seattle, Washington, and active war bases in the Territory of Alaska for the United States Navy in time of war for use of combat surface vessels and combat aircraft of the United States Navy and Coast Guard. In connection with such shuttle service she also carried Navy bombs, ammunition, torpedoes and munitions of war and other dry cargo. On her return trips while engaged in such

shuttle service she would return defective ammunition, empty oil drums, empty torpedo cases, damaged airplane parts and other Navy cargo. She was not employed as a merchant vessel or in commercial operations. She carried no commercial cargo or civilian passengers, but was operated solely and exclusively by the U. S. Navy in time of war in the aforesaid shuttle service.

Judge Foley expressed his views orally both as to the proposed findings and the law (R. 222-226) and after considering exhaustive briefs presented by both parties rendered a written decision (R. 41). So far as is material to this appeal, Judge Foley found:

"3. That on May 11, 1942, and for some time prior thereto, a state of war existed between the United States of America and the Empire of Japan and on said date, while said vessel, the Eastern Prince, was proceeding on a voyage from the Port of Seattle, Washington, to Prince Rupert, first port of call, with supplies and equipment for the Alaska Road up the inside passage to Alaska for the Elliott Steamship Company, and while off Campbell River Bluff opposite Campbell River was in collision with the United States tanker Roustabout; that at the time of said collision the USS Roustabout was a duly commissioned naval vessel of the United States of America employed solely for naval purposes as a regularly commissioned tanker of the United States Navy Department and officered by commissioned officers of the United States Navy and manned by a United States Navy crew, and armed with anti-aircraft guns and other armaments and ammunition for use in connection therewith. That the USS Roustabout at the time of said collision was engaged

in her aforesaid public employment and operated in connection with the prosecution of said war in the military and naval service of the United States of America in the transportation of military and naval supplies, to-wit, fuel oil, gasoline and other petroleum products, between military and naval bases on the west coast of the United States of America to military and naval bases of the United States in the Territory of Alaska for use by combatant naval vessels and aircraft of the United States of America; and that on southbound trips from said naval bases in the Territory of Alaska, the said USS Roustabout engaged in carrying cargo consisting of freight offered by the Navy or Coast Guard, empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles, and at the time of said collision, the said vessel had aboard water ballast and miscellaneous dry cargo of the nature just above described.

“4. That the site of the collision is a narrow channel under the International Rules.

“5. That at the time of said collision the USS Roustabout was at fault as follows:

(a) Failing to keep to the right of the channel;

(b) Failing within sight of the Eastern Prince to indicate a change of course on her whistle;

(c) Failing to keep a proper lookout in that the lookout aboard the Roustabout after sighting the red light of the Eastern Prince took no action concerning same and failed to notify the officer on the bridge of the whereabouts of the Eastern Prince.

“7. That libelants suffered loss for particular and general average charges and disbursements occasioned by said collision and the damages resulting to the East-

ern Prince in consequence thereof in the sum of \$11,031.29." (R. 47-49.)

The findings of ultimate fact that the collision and damage to the *M/V Eastern Prince* was a consequence of the *Roustabout's* warlike operation are contained in Judge Foley's Conclusions of Law appearing as follows:

"1. That at the time of the collision between the USS *Roustabout* and libelants' vessel, *Eastern Prince*, the *Roustabout* was a duly commissioned naval vessel of the United States employed solely for naval tanker purposes, officered and manned by naval officers and crew and operated by the United States Navy and engaged in warlike operations.

"2. That the collision and damage resulting therefrom to libelants' vessel, *Eastern Prince*, was a consequence of *Roustabout's* warlike operations.

"3. That the said collision occurred by reason of the mutual fault of both vessels." (R. 49, 50.)

The appellant's assignment of errors numbers 1, 2, 3, 4, 5, 6, 7 and 9 raises the principal question:

Was the loss and damage to the *M/V Eastern Prince* occasioned by the collision with the *U.S.S. Roustabout* the consequence of a warlike operation?

Appellant's assignment of errors numbers 6 and 7 raises the question whether there is any evidence to support the finding of fault on the part of the *Roustabout*, it being necessary to show that the *Roustabout* was at least partially at

fault to support the conclusion that the collision and damages to the *Eastern Prince* was a consequence of a warlike operation. If the collision resulted from the sole or partial fault of a vessel engaged in a warlike operation, then the case is one of war risk. If the collision resulted from the sole fault of a vessel not so engaged, the case is one of marine risk. The District Court found the collision resulted from the mutual fault of both vessels and a consequence of the warlike operation in which the U.S.S. *Roustabout* was then engaged.

ARGUMENT

I. The Collision of the U.S.S. *Roustabout* with the Motor Vessel *Eastern Prince* and Loss and Damage Resulting Therefrom Were Consequences of the Warlike Operations of the U.S.S. *Roustabout*.

A. *American Courts Follow English Decisions on Questions of Marine Insurance Law.*

There is a dearth of American cases on construction of the terms "consequences of hostilities and warlike operations" as those terms are used in marine policies of insurance while English decisions have dealt with and fully developed the subject over a period of many years. Thus the American courts have found it of paramount importance in matters of marine insurance law to be guided by such English decisions.

In the first American case (arising out of the First World

War) involving this question, Justice Holmes considered it necessary to keep in harmony with the marine insurance laws of England. He stated:

“There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business.” *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Company*, 263 U.S. 487, 68 L. Ed. 402 (1923).

Uniformly our courts have been guided by the foregoing principle as illustrated in the following cases.

Justice Augustus N. Hand in *Mellon v. Federal Ins. Co.*, 14 F. (2d) 997 (1926—So. Dist. N. Y.) at p. 1004, stated:

“Not only does the reasoning of the English decisions seem more convincing, but it is particularly desirable in cases of marine insurance that the decisions of the American and English courts should be in harmony.”

Justice Swan in *New York & Oriental SS Co. v. Automobile Ins. Co.*, 37 F. (2d) 461 (CCA 2nd, 1930), p. 463, stated:

“The plaintiff relies upon a recent decision of the House of Lords. * * * If that august tribunal has laid down a controlling principle, we should hesitate to depart from it; for in matters maritime, and especially insurance, the importance of conformity between the English law and our own has been often emphasized.
* * *”

Judge Foster in *Aetna Ins. Co. v. Houston Oil Transport Co.* (1931), 49 F. (2d) 121 (CCA 5th), p. 124, stated:

"Federal courts look to the laws of England for guidance in matters of marine insurance and follow them unless, as a matter of policy, a different rule has been adopted. *Queen Ins. Co. v. Globe Ins. Co.*, 263 U.S. 487, 44 S. Ct. 175, 68 L. Ed. 402. * * *"

Judge Swan in the *Gallileo*, 54 F. (2d) 913 (CCA 2nd, 1931) p. 915 stated:

"Our statute was taken from an earlier British Act (26 Geo III c. 86), as was pointed out in *Norwich & N. Y. Trans. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 117, 20 L. Ed. 585, and the present British statute (57 and 58 Vict. c. 60 Sec. 502, par. (1) is very similar to our own. Hence the construction put upon their statute by the British Courts has a peculiar significance, additional to any weight to be accorded to the general desirability of uniformity in British and American law in matters maritime, a consideration noted in *Queen Ins. Co. v. Globe & Rutgers Ins. Co.*, 263 U.S. 487, 493, 44 S. Ct. 175, 68 L. Ed. 402. * * *"

Judge L. Hand in *Aetna Ins. Co. v. United Fruit Co.*, 92 F. (2) 576 (2 CCA) (1937), p. 580 stated:

"* * * We do not forget that we are not to depart from English maritime law, when we can help it * * *"

Judge Hulbert in the *Shodack*, 16 F.S. 218 (So. Dist. N. Y. 1936) at p. 219 stated:

"In *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.* (The Napoli), 263 U.S. 487, 44 S. Ct. 175, 176, 68 L. Ed. 402, Mr. Justice Holmes said: 'There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business.'"

In *Aetna Insurance Co. v. United Fruit Co.*, 1938 A.M.C.

707, 304 U.S. 430, Mr. Justice Stone in delivering the opinion of the Court, stated:

“We recognize that established doctrines of English maritime law are to be accorded respect here * * *.”

The District Court in this case gave effect to the foregoing principle of necessity in following English decisions, *Link v. General Insurance Company* (1944 D.C. Wash.) 56 F. Supp. 275, *Link v. General Insurance Company* (1948 D.C. Wash.) 77 F. Supp. 977, (R. 41) Judge Bowen in his decision stated:

“In approving the policy of applying in American courts the English court decisions, Justice Holmes, for the Supreme Court in the *Queen Ins.* case, finally gave effect to the conclusion of expediency, reached reluctantly by Judge Hough of the District Court and affirmed by the Second Circuit Court of Appeals, that the best interests of all concerned in the war risk phase of the world wide marine insurance field require that American courts follow English court decisions because, as Justice Holmes said: ‘There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * *.’ Approval of that policy has been in varying form stated also in the following federal court cases: *Mellon v. Federal Ins. Co.*, D.C., 14 F. 2d 997, 1004; *New York & Oriental S.S. Co. v. Automobile Ins. Co.*, 2 Cir., 37 F. 2d 461, 463; *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 5 Cir., 49 F. 2d 121, 124; *The Galileo*, 2 Cir., 54 F. 2d 913, 915; *Aetna Ins. Co. v. United Fruit Co.*, 304 U.S. 430, 438, 58 S. Ct. 959, 82 L. Ed. 1443.”

Judge Foley on the merits likewise followed English decisions. (R. 42.)

B. The Construction of the Terms "Consequences of Hostilities or Warlike Operations" Contained in English Charters and Appearing in the F. C. & S. Clause of Marine Insurance Policies Are Similarly Construed.

The terms "consequences of hostilities or warlike operations" appearing in English charter provisions and in the F. C. & S. Warranty of marine insurance policies are similarly construed by decisions. Lord Wright in the *Coxwold* (*Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport*), House of Lords 1942, 58 The Times L.R. 263, (1942) A.C. 691, stated:

"It is true that these words (the consequences of hostilities or warlike operations) occur in the present and similar cases in a charter party entered into between the Crown and the owner of the requisitioned ship, but they are to be construed as if they occurred in a policy, because they form part of a contract of indemnity which is in truth a contract of marine insurance."

C. Under English Decisions the Law Is Now Well Settled in Regard to What Constitutes a War or Marine Risk Within the Meaning of the Terms "Consequences of Hostilities or Warlike Operations" As Those Terms Are Used in the F. C. & S. Warranty of a Marine Insurance Policy.

There has been a vast development in the decisions of the English courts upon the question of what constitutes a

marine or war risk under a marine insurance policy containing a F. C. & S. Warranty and in construing the terms "consequences of hostilities or warlike operations." The law on construction of these terms is now well settled. Lord Atkin recognizing this fact in the *Coxwold*, *supra*, stated:

"* * * Rightly or wrongly nearly every question that can arise on the controversy between marine and war risk has been settled to the great convenience of the shipping world, if not with the approval of all their advisers. If the warlike operation includes the direction of the war vessel through the water from one war starting point to another war destination it seems to remain true that almost every casualty to a ship during such an operation will be the consequence of a war operation.
* * *"

***D. English Cases on the Construction of the Terms
"Consequences of Hostilities or Warlike Operations."***

In order to have a full understanding of the question of war versus marine risk, it is necessary to review the developments of English cases on the subject.

(1) The *Coxwold* case. (House of Lords, 1942.)

The leading case and the highest expression of thought on the subject of war risk versus marine risk under marine insurance policies is the *Coxwold* (*Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport*), House of Lords 1942, 58 The Times Law Reports 263, (1942) A. C. 691. The *Coxwold* was requisitioned by the British Minister of War Transport and insured by her owners against marine

perils excepting war risk (F. C. & S. warranty). The Government accepted those risks excluded by the F. C. & S. warranty in the marine policies, including the risk of "all consequences of hostilities and warlike operations." While on a voyage carrying military supplies (cargo of petrol in tins) from Greenock to Narvik, in May 1940 the *Coxwold* stranded on Damsel Rock. There was no negligent navigation on her part and the course steered seemed to be a safe one and her course had been previously altered under Naval orders to avoid what was thought to be an enemy submarine. Since the *Coxwold* was carrying war supplies from one war base to another war base it was conceded she was thus engaged in a warlike operation. The case held that the proximate cause of the stranding resulting in the loss of the *Coxwold* was the warlike operation (i.e., carrying military supplies from one war base to another) in which the vessel was then engaged and was thus due to a risk excluded by the marine policies (i.e. F. C. & S. clause) and assumed by the Crown under the charter.

Lord Porter traced the development of the subject in the *Coxwold*, stating:

" 'Warlike operations' has generally been considered a phrase of wider meaning than 'hostilities,' and it will, I think, suffice to reach a conclusion whether the loss of the *Coxwold* was due to risks included in the first-mentioned phrase. Some considerable guidance has been afforded to your Lordships by previous decisions of this

House and one can, I think, tabulate certain conclusions which have finally been reached.

“(1) In this as in every other insurance problem the proximate cause is alone to be looked at. *Ionides v. Universal Marine Insurance Company* (supra). (2) But the proximate cause is not necessarily the nearest in point of time; it is the dominant cause. *Leyland Steamship Company, Limited v. Norwich Union Fire Insurance Society* (34 The Times L. R. 221; (1918) A.C. 350), *Samuel v. Dumas* (40 The Times L. R. 375; (1924) A.C. 431). (3) In the case of a ship proceeding on a voyage which is not itself a warlike operation, absence of lights, sailing in convoy, and zigzagging are not separately or in combination a warlike operation, nor indeed is it a warlike operation to follow the course set by the naval officer in charge of the convoy. *The Petersham* and *The Matiana* (36 The Times L. R. 791; (1921) 1 A.C. 99). (4) The dimming or extinguishing of a shore light is a warlike operation, but if a ship engaged in a mercantile operation goes ashore because she is out of her reckoning, she is not lost by the warlike operation merely because she would most probably have realized and avoided the danger had the light been seen. *Ionides v. Universal Marine Insurance Company* (supra). (5) A ship carrying war stores from one war base to another is engaged on a warlike operation. *The Geelong* (39 The Times L. R. 133; (1923) A.C. 191). (6) A collision caused by a ship so engaged is caused by the warlike operation. *Attorney-General v. Ard Coasters* (37 The Times L. R. 692; (1921) 2 A.C. 141). (7) A collision solely caused by a ship engaged on a mercantile adventure is not caused by a warlike operation even though that ship collides with or is struck by one engaged on a warlike operation. *The Clan Matheson* (45 The Times L.R. 408; (1929) A.C. 514). (8) If the collision be caused both by the ship so engaged and by one not so engaged so that both were effective causes of the disaster the consequent loss is due to the

warlike operation. *Board of Trade v. Hain Steamship Company* (45 The Times L. R. 550; (1929) A.C. 534). (9) The collision if due in whole or in part to the action of the ship engaged in a warlike operation does not cease to be caused by the warlike operation by reason of the fact that that action is negligent. *The Warilda* (39 The Times L. R. 333; (1923) A.C. 292)."

Lord Porter concluded that:

"The logical conclusion of these observations would seem to be that, in a case where the warlike operation consists in passing from one war base to another, any accident due to proceeding between the starting and finishing points is caused by the warlike operation * * *

"* * *

"* * * *Stranding, it is true, is normally a marine risk just as a collision is, but it may nevertheless be effectively caused by a warlike operation where that operation is the proceeding from one war base to another and the stranding takes place as a result of so proceeding.*" (Emphasis supplied.)

Lord Wright in reaching his conclusion that the stranding was proximately caused by the *Coxwold's* warlike operation, said:

"* * * The warlike operation was, as it were, an umbrella which covered every active step taken to carry it out, including the navigation, the course and helm action intended to bring the vessel to the position required by the warlike operation, and that none the less because accident or mischance or negligence lead to stranding or collision. * * *" (Emphasis supplied.)

Lord Atkin in the *Coxwold*, recognizing that collision

damages caused by a vessel engaged in a warlike operation were a consequence thereof, said:

“* * * if in the course of a warlike operation the direction of the ship’s course against another ship is a consequence of a warlike operation, *Attorney-General v. Ard Coasters* (37 The Times L. R. 692; (1921) 2 A.C. 141), *it is surely impossible* to distinguish the case where the course of the ship is directed against a rock, and this whether negligently or without negligence, and whether the ship is deflected by tide, or current or wind. * * *” (Emphasis supplied.)

(2) *The Geelong-Bonvilston*, 39 The Times L.R. 133; (1923), XIII Ll. L. Law Rep. 455, held that the transportation of war material from one war base to another is a “warlike operation” within the meaning of that term in a policy of marine insurance.

The facts were: The *Geelong* requisitioned by the Australian Government for transportation of war material was at the time of collision transporting general cargo from Port Said to Gibraltar. The *Bonvilston*, requisitioned by the British Government, was carrying ambulance wagons and other Government stores from Mudros to Alexander. The collision occurred without negligence on the part of either vessel and during the first world war. The *Bonvilston* was held to be engaged in a warlike operation within the terms of the charter party in effect insuring the *Geelong* against all consequences of warlike operations. The Lord Chancellor stated:

“* * * The expression (i.e. ‘warlike operation’) is not confined to actual combatant operations against the enemy, whether by way of attack or of defense; for in the case of *Richard de Larrinaga (Liverpool and London War Risks Insurance Assn. v. Marine Underwriters of steamship Richard de Larrinaga, (1921) 2 A.C. 141)* a warship on her way to pick up a convoy was held by this House to be engaged in a warlike operation. Indeed, it has been said that almost any movement of a warship in the course of her duties may be included in the phrase ‘warlike operations.’ *Probably the phrase includes all those operations of a belligerent power or its agents which form part of or directly lead up to those processes of attack and defense which are of the essence of war.* Thus, as was said by Lord Atkinson in the *Petersham* case, the transfer of the combative forces of a belligerent power from one area to another for combative purposes would be a warlike operation; and the same may, I think, be said of the transport in like manner of guns or munitions of war. *Nor, in my opinion, can any valid distinction be drawn in this respect between munitions of war and the materials for equipping a fighting force, such as saddles for the cavalry, field kitchens for the infantry, or ambulance wagons for the wounded in battle. All these things are an essential part of the equipment of an army in the field, and to transport them to an area of war is a part of the warlike operations conducted in that area not less essential than the provision of men, guns, rifles, or ammunition.*”

“* * * In the absence of any circumstances tending to put a different colour upon the transaction, *the carriage in time of war of ambulance wagons and other Government stores from one war base to another war base is carriage for the purpose of the war.* It is immaterial whether the wagons and stores are being taken to a base for the purpose of warlike operations to be conducted from that base, *or are being fetched away from a base because the warlike operations conducted from it*

have ceased. In either case the carriage is part of a military operation." (Emphasis supplied.)

In the *Coxwold* Lord Wright, commenting upon the reasoning of the *Geelong-Bonvilston* case, stated:

*"The next development came through treating a merchant vessel as being on the same footing as a war vessel, simply because of the cargo she was carrying and the character of the place of departure or destination. Once it was determined that she was to be treated as on this footing it did not matter that the sea peril, collision or the like, was, apart from the special character attributed to her, merely an ordinary marine casualty, the occurrence of which was in no way influenced by the nature of her cargo, or indeed her ports of sailing or destination, except in the sense that she was being navigated on the particular voyage. This was a big step, which was taken once for all in Australian Commonwealth Shipping v. P. & O. Branch Service, The Geelong-Bonvilston * * *"* (Emphasis supplied.)

(3) *The Ardgantock*—*The Richard de Larrinaga*, (1921)
37 *The Times Law Reports* 692, VII *Lloyds List Law Reports*, 150, decided jointly.

The House of Lords in these two decisions considered two cases involving collisions between merchant vessels and men-of-war. In *The Ardgantock*, a merchant ship chartered to the Government collided with the British destroyer *Tartar* when the latter vessel turned on her beat while patrolling for submarines. Neither vessel was found at fault. The decisions in the lower court and the Court of Appeals holding the damage to the merchantman was a war risk, as a consequence

of warlike operations, was confirmed by the House of Lords.

In *The Richard de Larrinaga*, a merchant ship insured against war risk while in convoy at night without lights, came into collision with the British warship H.M.S. Devonshire, which was on her way to meet another convoy which she was to escort.

Viscount Finlay said:

“* * * It is said there may be great difficulties in saying when the progress of operations begins. A nice question may arise, but it seems to me perfectly plain that, *when a war vessel is actually at sea and is there because she is under orders to go to a particular spot to undertake a warlike operation, whatever its nature may be, she is engaged in the course of that warlike operation, because she is doing that which is necessary to get to the spot where the actual thing is to be done.* * * *” (Emphasis supplied.)

(4) *The Warilda—The Adelaide Steamship Co., Ltd., v. Crown*, 39 The Law Times Reports 333, Vol. XIV Lloyds Law Reports 549, 1923 A.C. 292.

In this case the *Warilda*, under charter to the British Government, was an army hospital ship on her way from Havre to South Hampton with wounded men, doctors and nurses, navigating at night. She collided with the *Petingaudet*, a merchant vessel carrying general cargo (coke). *The Warilda was at fault*. The decision of the Court of Appeals that the damage to the *Warilda* was a war risk and the consequence of warlike operations, was affirmed in the

House of Lords. On the question of the *Warilda* being engaged in a warlike operation, Lord Shaw stated:

“* * * It appears accordingly to be beyond question that the ambulance transport *Warilda* was part of the naval forces of the country.

“* * * I do not have any doubt that at the time of the collision the *Warilda* was sailing in the course of warlike operations. * * *”

In the *Warilda* it was contended that negligence was the proximate cause of the loss and damage and for that reason was not a consequence of a warlike operation. The House of Lords overruled this contention and held that the loss and damage was a result of warlike operations notwithstanding the negligence of the *Warilda*, her negligence being immaterial.

In the *Warilda*, Lord Shaw stated:

“* * * I do not have any doubt that at the time of the collision the *Warilda* was sailing in the course of warlike operations. It was argued that while this might be so, yet the collision was not a consequence of these operations. I do not think that in the state of the authorities this contention can be sustained. It was admitted that the collision must be attributable to one of two things, either to the warlike operations or to a sea risk, and the enumeration of sea risks even under the requisition of the charter-party no doubt includes ‘collision . . . or any other course arising as a sea risk.’ It seems out of the question to infer from this language that all collisions are ex necessitate sea risks. And, in short, it appears to me that when a ship requisitioned by the naval authorities and actually engaged in what

I have explained to be a warlike operation comes into collision with another vessel, under, of course, the exceptional conditions of speed, lights doused and such warlike operations, the category of war risk cannot be changed into the category of sea risk by reason of the negligence of those engaged in conducting these operations. The conduct may have been faulty, but it was a warlike operation although faultily conducted. *Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted, namely of converting a war risk into a sea risk. Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although these movements had an element of negligence in their operations.*"

The *Warilda* was cited with approval in the *Coxwold* wherein Lord Wright stated:

"This case was shortly afterwards followed by *Attorney-General v. Adelaide Steamship Company* (*The Warilda*) (39 The Times L. R. 333; (1923) A.C. 292). That vessel, which had been requisitioned by the British Government under T99, sustained damage owing to her running into the *Petingaudet*. The collision was due to her negligence. But as the casualty was caused by the act of those on the *Warilda* in directing her course through the water in execution of a warlike operation—namely, the carriage of wounded soldiers from France to Southampton in March, 1918, it was held that the damage was a direct consequence of the operation and recoverable under T99. That the loss was caused by the negligence of the suppliant's servants was immaterial. That was merely an application of the ordinary rule that in marine insurance claims it is generally immaterial that the loss was attributable to the negligence of the plaintiffs or their servants. What are

material are the event and its objective cause, negligence is not a cause for this purpose."

(5) *The Trevanion—Roanoke*, 45 *The Times L. R.* 550, *English Commercial Cases*, Vol. 35, page 29.

The facts: In this case an action was brought by the owners of the *Trevanion* under the British charter insuring war risk against the peril of "warlike operations". The *Trevanion* was under requisition to the British Government and carrying a cargo of oats from New York to Portland. The *Roanoke* was operated by the United States Navy as a mine planter and was on a voyage from Portland to Hampton Roads, Virginia, returning from the theater of war with 720 mines aboard belonging to the United States Navy. Both vessels were at fault for having improper lookouts. The navigation lights were being fully displayed and collision occurred after the Armistice and in peaceful waters away from the scene of prior hostilities. In this case Lord Warrington quoted the findings of the arbitrator as follows:

"The following are the findings of the arbitrator on which the question turns:

" '5. The steamship *Roanoke* at the time in question was in the possession and control of the United States of America under a bare boat charter. During the period from the 25th June, 1918, to 25th January, 1919, she was employed by the United States of America solely for naval purposes as a regularly commissioned mine-planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of

the United States Navy and manned by a United States Navy crew.

“ ‘At the time of the collision with the Trevanion the Roanoke, under her aforesaid public employment and officered and manned as above stated, was proceeding from Portland, England, to Hampton Roads, Va., with 720 mines on board belonging to the Navy Department of the United States of America, and was carrying no other cargo and no passengers. She was exhibiting the regulation lights. There was no evidence before me as to the circumstances under or the purposes for which the mines in question were being carried.

“ ‘6. Having carefully considered the evidence as to the said collision, I find that it was caused by the negligent navigation of both vessels and that both were equally to blame. The said negligence consisted in a bad look-out on both, insufficient porting by the Trevanion, and failure to keep her course on the part of the Roanoke.”

The holding: It was held (1) the Roanoke was engaged in a warlike operation; (2) the fact of mutual fault did not relieve the Crown from liability.

Lord Warrington's reasoning:

“* * * Hostilities were suspended, but the War was not at an end; and in my opinion it was open to the arbitrator to hold that, notwithstanding the suspension of hostilities, the voyage of the Roanoke under the circumstances found by him was a warlike operation.

“* * * the arbitrator has found that during the period, including the day of the collision, *the Roanoke was employed solely for naval purposes as a regularly commissioned mine-planter carrying a large cargo of*

mines. In a state of war that fact is in my opinion enough to constitute her voyage a warlike operation. It could not be denied that on the voyage out she was engaged in such an operation, and, in the absence of evidence to the contrary, the same quality must in my opinion attach to the remainder of her voyage." (Emphasis supplied.)

Viscount Sumner's reasoning:

"The appellant's proposition was that it is not enough to prove what the Roanoke was, unless it is also shown what she was doing. I recognize the high importance of considering the ship's errand and the purpose of her voyage; but I should have thought that, *having proved an animal at large to be a lion, it was not further indispensable to prove that he was not at the moment merely performing as a lamb*, unless of course some circumstances of ovine behaviour happened to be apparent. * * * *We have no right, in law or in fact, to assume without evidence that such a ship is not engaged on the duty for the service of which she forms part of the Navy to which she belongs; and the mere fact that we do not know why she was sailing away from the ordinary area of hostilities for purposes unknown does not establish such a conclusion, however ample the scope for speculation may be. It is not for us to presume to know all the purposes of the Naval authorities of the United States at that time. In the absence of knowledge I think that the arbitrator committed no error of law in presuming that the purpose of her voyage was such as to consist with her general warlike character, and in the like absence I think it would be useless for me to estimate the chance of her mission being of one kind rather than of another. This is a stronger case than that of a man-of-war returning to her home port still equipped with her permanent armament.* * * *'" (Emphasis supplied.)

**E. American Cases on Construction of the Terms
“Consequences of Hostilities or Warlike Operations.”**

There are but few American cases construing the terms “consequences of hostilities or warlike operations” as found in the F.C. & S. clause of a marine insurance policy.

The first case dealing with *war risk* appears to be that of *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Company* (The Napoli)—278 Fed. 770 (1922 N.Y.D.C.); Aff. 282 Fed. 976 (1922) 2 CCA; Aff. 263 U.S. 487, 68 L. Ed. 402 (1923). The *Napoli*, during the first World War carrying general cargo and a small amount of military supplies sailed from Gibraltar for Genoa in convoy with screened lights, subject to orders of the escort of naval officers in command. She collided with the British steamer *Lamington* in an opposite bound convoy similarly commanded. Citing an early decision, *Morgan v. United States*, 5 Ct. Cl. 182; 81 U.S. 531 (1871) and relying on the early English decisions in the *Petersham* and *Matiana* cases, (Britain S.S. Co. v. Rex (1921) 1 A.C. 99, 123 L.T.N.S. 721, 36 Times L.R. 791, 25 Com. Cas. 392, 15 Asp. Mar. L. Cas. 58-H.L., Justice Holmes held the loss to the NAPOLI was not the result of a warlike operation within the term “all consequences of warlike operations” of a marine insurance policy.

Morgan v. United States, supra, involved construction of the term “*war risk*” in a charter party but did not include the terms “consequences of hostilities or warlike opera-

tions" nor involve construction of a marine insurance policy. As will be seen the Supreme Court of the United States as well as the House of Lords have since repudiated the narrow application of proximate cause in the *Morgan case* and earlier English decisions.

The *Queen Insurance Company case* arose prior to the *Coxwold* and the full development of the modern law construing the terms "consequences of hostilities or warlike operations." A subsequent development was the principle that a vessel carrying military stores from one war base to another was engaged in a "warlike operation." The facts of the *Queen Insurance Company case* do not indicate that either of the vessels involved were engaged in a warlike operation.

Justice Holmes in dealing with the *Queen Insurance Company case* deviated from well established principles of causation with respect to marine insurance law stating "* * * we are not to take broad views, but generally are to stop our inquiries with the cause nearest to the loss." However, Justice Holmes subsequently in *Standard Oil Co. v. United States* (1923) 267 U.S. 76, 69 L. Ed. 519 in effect repudiated the theory of causation announced in the *Queen Insurance Company case* and adopted the true concept of causation as applied in marine insurance law, stating:

"In defense it is argued that the proximate cause was a marine peril not covered by the policies, and that

the decision should be governed by *Morgan v. United States*, 14 Wall. 531, 20 L. Ed. 738; *Queen Ins. Co. v. Globe & R. F. Ins. Co.*, 263 U.S. 487, 68 L. Ed. 402; and other similar cases. But in those very strict applications of a well-known rule, however strong the motives of the insured or owners for acting as they did, the loss ensued upon their own conduct. But if a vessel should be taken from an owner's hands without his consent, and should be lost while thus held by a paramount power, obviously a company that had insured against such a taking could not look beyond, and attribute the loss to a peril of the sea. Whatever happens while the taking insured against continues fairly may be attributed to the taking. That is a non-conductor between the insured and subsequent events."

The insured vessel the *Llama* in the *Standard Oil Company case*, supra, had been seized by British officers some two days prior to the stranding which occasioned the loss. Thus the stranding, ordinarily a marine peril, was the cause nearest the loss; but, under the view adopted by Holmes, the seizure of the vessel was the proximate cause thereof, although not the cause nearest in time.

Prior to the *Queen Insurance Company case*, the United States Supreme Court in considering the construction of a fire insurance policy, and in particular an exception excluding liability for loss or damage by fire by reason of any military or usurped power had occasion to state that the proximate cause is not necessarily that cause nearest in time or place to the catastrophe. The court stated in *Aetna Ins. Co. v. Boon*, 95 U.S. 117, 24 L. Ed. 395:

“In view of this state of facts found by the court, the inquiry is, whether the rebel invasion or the usurping military force or power was the predominating and operative cause of the fire. *The question is not what cause was nearest in time or place to the catastrophe.* That is not the meaning of the maxim ‘*causa proxima, non remota spectatur.*’

“The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. * * *

“* * *

“The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. * * *” (Emphasis supplied.)

In *the Smaragd (Lanasa Fruit S.S. & Importing Co. v. Universal Insurance Co.)*, 302 U.S. 556, 1938 A.M.C. 1, the United States Supreme Court again affirmed the rule that “proximate cause” is the efficient cause and not the cause nearest in time. There the court had under consideration a claim under a marine insurance policy. The Court speaking through Justice Hughes stated:

“It is true that the doctrine of proximate causation is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result.”

And further the Court in *Smaragd* decision (*supra*) following English law on the construction of marine insurance policies quoted with approval from *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (1918) A.C. 350, 368-371 as follows:

“What does ‘proximate’ here mean? To treat proximate cause as if it were the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved, although other causes may meantime have sprung up which have not yet destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.”

In the *Coxwold* the House of Lords cited with approval the *Leyland Shipping Co. case* on the question of proximate cause, and it can now be said with assurance that English and American decisions on the subject of proximate cause are in harmony.

In the case at bar *Link v. General Insurance Company of America* (D.C. Wash. 1944) 56 F. Supp. 275, 77 F. Supp. 977 (1948) Judge Bowen in considering the *Queen Ins. Co. case* said:

“Thus the *Queen Ins. Co. case* teaches that, in deciding whether a marine loss is covered by a war risk insurance clause, two principles are to be considered. One is that we ‘generally are to stop our inquiries with the cause nearest to the loss.’ The other is that for expediency and harmony in the marine insurance world

the American courts should follow the English court decisions. The *Queen Ins.* case did not say which one of those principles is paramount in case of conflict between them, probably because it does not appear such a conflict existed in that case.

“It seems clear, however, that the requirement to follow English court decisions is a more specific and less variable criterion than that of stopping at the cause nearest to the loss, because if there is an authoritative English decision on the facts of the case in question that decision concludes the matter, whereas stopping at the cause nearest to the loss may and usually does reasonably involve the further debatable question of what is or what is meant by the nearest cause of loss.

“So if on the facts involved here there are English court decisions clearly applicable, no good purpose would be served by extending discussion beyond a brief statement of the essential facts and rulings of the cited cases followed by the court’s conclusions as to their application to the case at bar.”

Judge Foley in his final decision in the case adopted the views of Judge Bowen, (R. 41-49—77 F. Supp. 977, 1948 A.M.C. 438).

F. The Facts Support a Finding that Collision and Damage to M/V Eastern Prince was a Consequence of a Warlike Operation.

The facts amply support the District Court’s finding that the *U.S.S. Routabout* was engaged in a warlike operation and the collision and damage to the *M/V Eastern Prince* was a consequence of a warlike operation within the well-

established principles of marine insurance law under the leading American and English decisions.

The *U.S.S. Roustabout* in May 1942 was a duly commissioned Naval vessel of the United States Navy with the same naval status as a battleship or carrier or auxiliary. She was a Navy tanker with a capacity of 10,000 measurement barrels and with dry cargo space and dimensions of 221 feet in length and 39 feet beam. She was manned by commissioned officers and enlisted men of the United States Navy. She had armament aboard, a 3" gun on the stern, two 50-caliber machine guns on the bridge and two 20 mm. guns forward for protection against the Japanese and capable of being used for offensive purposes against enemy water craft and air craft. (R. 80, 81, 97, 98.)

The *Roustabout* was engaged in war duties between Seattle and Sitka, the main naval war base in Southeastern Alaska and served, in addition, outlying naval auxiliary bases at Port Arthrop and Tamgas Harbor on Annette Island and the Coast Guard base at Ketchikan (R. 82, 85, 103). She carried no commercial cargo (R. 82) and there were no civilian employees on her as either officers or crew (R. 81, 97) nor was she operated at the time as a merchant vessel (R. 82, 187). Her primary duty was carrying bulk petroleum products in a *shuttle service* between naval bases in Seattle and *war bases* in Southeastern Alaska for the United States Navy in time of war (R. 82, 85, 98, 99, 103). Oper-

ating as a naval tanker in time of war she lifted her cargo from naval war bases at Seattle which served as supply bases for the entire Alaska-Aleutian area (R. 82, 99, 100, 101, 102). In addition to petroleum products she carried Navy bombs, ammunition, torpedoes and any munitions or war supplies as required in the prosecution of the war. (R. 82, 83, 85, 86, 99).

The war bases in Alaska were active war bases (R. 101). In her continuous *shuttle service* she maintained regular runs between Seattle and war bases in Southeastern Alaska. Southbound she would return cargo of all descriptions including defective ammunition, empty oil drums, empty torpedo cases (R. 101, 102, 103) and her purpose in returning to Seattle was to re-load with petroleum products and dry cargo, bombs, torpedoes, etc. for the Navy and go North again to war bases in Alaska (R. 102). The petroleum products and munitions carried to Alaska were for use of combat surface vessels and aircraft "The Naval Forces Afloat, Ashore and in the Air" (R. 86). Southbound cargo was for the benefit of the Navy, defective ammunition going to Ordnance (R. 86), airplane parts being delivered to the Naval Air Stations and empty gasoline or oil drums being returned to the Navy for refilling (R. 86). She was on active Naval duty in time of war as a duly commissioned Naval vessel of the United States Navy at the time of collision (R. 87). "A commissioned vessel of the United States Navy is a ship

of the Navy, regardless of what her past history was or what her category was" (R. 87). In May 1942 the Navy was in dire need of transportation and utilized the dry cargo space of the *Roustabout*, for the transportation of bombs and other ammunitions needed in Alaska for war purposes (R. 89). The *Roustabout* carried aerial bombs for patrol planes, torpedoes for planes and submarines and various and sundry other munitions for use in waging the war against Japan (R. 91.) There is a tremendous amount of defective ammunition always moving the other way from an advanced area. It was the *Roustabout's* duty and she was employed to carry this defective ammunition away from the advanced area (R. 92).

The area in which the *Roustabout* traveled in the performance of her naval duty in time of war was an active war area. Captain Larry Parks, her Commander, went on active duty as an United States Commissioned Officer on May 12, 1942 (R. 95) and became Commanding Officer of the *U.S.S. Roustabout* on March 30, 1942 (R. 96). There was one Japanese submarine sunk in the area of collision (R. 98) and enemy activity was reported in the general region (R. 101).

Admiral Frederick Zeusler confirmed other testimony that the *U.S.S. Roustabout* by nature of her character, her duty and her service was engaged in a warlike operation at the time of the collision. He has had approximately 39 years

active service in the United States Coast Guard with 13½ years in Alaska. He was on the staff of *Comal* which was the name of the command of the Alaska Sector in the early days of the war with Japan (R. 181) and was in personal command of the Floating Forces in the Sitka Sector in May 1942 (R. 181, 182). Admiral Zeusler had knowledge of the *Roustabout*, of her character and the nature of the service in which she was engaged. He testified:

“* * * The USS Routabout was used as tanker and general service vessel between Seattle and bases in Alaska. While in Alaska we used her for various duties, depending on the conditions that existed. In the early days it was absolutely necessary to make use of everything—every type of craft we could possibly get; fishing vessels, towboats, anything that was available, because our equipment in Alaska was extremely bad. We were limited to very few types of craft, so that when we got a vessel of any kind whatsoever we converted her as fast as we could and made her available for any type of duty that we needed. *The ROUSTABOUT was used primarily in shuttle service between here and Alaska.* (R. 182). * * *

“She was a commissioned vessel, the same as any of the other vessels that we have, manned by commissioned officers and men.” (R. 183).

The naval war bases of supply were in Seattle at Pier 91, Manchester and Bremerton, which bases furnished gasoline and ordnance equipment that were needed by the Navy for Alaska. In May 1942 a state of war existed between the Empire of Japan and the United States of Amer-

ica (R. 183). Respecting war activity in the Alaska sector in 1942 Captain Zeusler testified:

"We had reports from planes, ships, patrol vessels, fishermen of submarine activities on the 22nd of January, the 7th of February, the 22nd of March, the 1st of April, the 12th of April, the 23rd of May, the 7th of June, the 13th of June, the 7th of July and the 20th of July. (R. 184).

"Q. What, if anything, did you do or was done under your orders or command in reference to that war activity; what did our Forces do?

"A. I was in Command of the Floating Units and coordinated floating units with the aviation units from Sitka, Annette Island, Port Armstrong and Port Althrop.

"I might say that we finally got our first submarine on July 9th. That submarine was sunk about thirty miles off the west coast of Prince William,—I will have to check on that Island. (R. 184).

"Q. What general locality?

"A. Approximate latitude of 51 degrees, 21 minutes, 2 seconds; longitude, 134 degrees, 40 minutes, and 7 seconds west. Following the middle of June, the Gorgas was attacked by a submarine and she managed to escape but she was pretty well peppered with shots.

"In July the Arcadia, a merchant vessel, was sunk one hundred miles south of Kodiak. One of our fishermen—that we had inducted into the Service—picked up a crew. She was then in an auxiliary status. (R. 184).

"Q. Admiral, what if any war bases in your Sector, in the Territory of Alaska, were served by the USS Roustabout during the month of May, 1942? (R. 184).

"A. In direct service they were usually the bases at Ketchikan and Sitka. (R. 185).

"Q. [Were] those war bases?

"A. Yes, sir.

"Q. Active?

"A. Active—extremely active. The other bases that were serviced were Port Althrop, which was a Navy auxiliary facility, Juneau, which was a section base, Port Armstrong, which was a Navy auxiliary facility. We had to send her out to Kodiak on a number of occasions, and she also visited Seward, both of which were also active sections." (R. 185).

"A. From Port Althrop we operated patrol boats and two planes. Those patrol boats and planes were used at the entrance,—were used to check on enemy activity at the entrance to that particular port. At Juneau we maintained section bases,—section bases where we had approximately four patrol craft. At Sitka we had floating patrol craft and planes. Those planes were used to scout offshore for enemy submarines, especially with regard to convoys. At Port Armstrong we maintained patrol boats and some planes and they were used to scout offshore and also to patrol the entrance, because those days we did not allow large, slow craft to go off shore. We made most of the vessels go inside because of the fact that we knew submarines were off the American coast or off the Alaska coast. In many cases those vessels were

usually formed into convoys and taken across in formation. From Ketchikan we operated patrol craft and two planes. From Annette Island we operated one patrol craft and planes. Annette Island's planes and Ketchikan's planes were used for patrolling the Dixon Entrance Sector. (R. 187, 188).

"Q. What function did the Roustabout serve, Admiral, in connection with the operation of surface (and) aircraft at these bases during May of '42?

"A. The materials that she brought to us were used to service these crafts." (R. 188).

While land forces of the Japanese did not land in Southeastern Alaska there was activity of their sub-surface craft in Southeastern Alaska. Submarines were sighted in Dixon Entrance within a mile of Annette Island and off observation posts off the West Coast within a mile of shore and off the coast of Oregon, Washington, California and British Columbia, and submarines sank "ships up there (Southeastern Alaska), too." (R. 197).

Not only were the facts of the Roustabout engaging in a warlike operation confirmed by all of the libelants' witnesses but the only witness produced by the appellant confirmed the warlike character and warlike operation of the *U.S.S. Routabout*. Mr. Beasley, lookout aboard the *U.S.S. Roustabout*, still in the Navy and a seaman aboard the *U. S.S. Roustabout* at the time of the collision, was a regular Navy enlisted man (R. 213). He testified that the *U.S.S.*

Roustabout was officered by officers of the United States Navy and manned by enlisted personnel of the Navy and that she was a duly commissioned vessel of the United States Navy in May 1942 engaging in a *shuttle run* between Seattle naval bases and war bases in Alaska carrying petroleum products northbound and bringing back whatever she could southbound (R. 213, 214). In addition to carrying petroleum products northbound, Mr. Beasley testified that she carried ordnance materials, meaning small arms, ammunition, anti-aircraft ammunition and torpedoes for submarines or aircraft (R. 214) and that southbound she brought back damaged airplanes and defective ammunition and damaged airplanes (R. 214, 215). The *U.S.S. Roustabout* was serving active war bases with war cargo for purposes of prosecuting the war. He testified further:

“Q. The cargo of petroleum products and ordnance materials you picked up where at Seattle—at Pier 91 or other stations here in Seattle?

“A. In this area, yes, sir.

“Q. And you delivered them to Sitka and other bases in Alaska?

“A. Yes, sir.

“Q. Were those active Naval Bases at that time in May of '42?

“A. Yes, sir.

“Q. Were there patrols being made by air and surface

craft out of those bases at that time searching for enemy submarines and aircraft?

“A. To my knowledge, yes.

“Q. And the petroleum products, including aviation gas, that you carried on the Roustabout north-bound, were used in those planes and vessels, were they not?

“A. Yes, sir.” (R. 214, 215).

Judge Foley in his summation of the evidence stated:

“We learn, however, from the witnesses that during a period of time including the month of May, 1942, the Roustabout was engaged in the service of the United States Navy in transporting from Seattle and nearby bases to war bases in southeastern Alaska, petroleum products, bombs, ammunition and other dry cargo for the use of the Armed Forces in carrying on the prosecution of the war with Japan. Her operations also included transporting from Alaskan bases to bases in Seattle and vicinity, such freight as was offered by the Navy or Coast Guard consisting generally of empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks, automobiles, torpedo cases and defective ammunition. * * *” (R. 41).

It is to be noted that the leading English authorities (with the exception of the *Coxwold* and the *Geelong-Bonvilton* which were found to be engaged in a warlike operation because of their carrying war cargo to a war base), rest their decisions on the character of the vessel, on the nature of her war duties, i. e. that it was a war vessel owned and

operated by the Navy or Army in time of war and the fact that the war vessel at the time was about her duty in time of war. It was found to be immaterial in which direction the war vessel was going or what she was carrying. For example, the British destroyer *Tartar* when in collision with the *Ardgantock* was on the "turn" of her beat while on duty patrolling for submarines. The British war ship *H.M.S. Devonshire* when in collision with another vessel was on her way to meet a convoy. The *Warilda*, when in collision with another vessel was an Army hospital ship headed back to England away from active war bases. The *U.S.S. Roanoke*, a mine planter, when in collision with another vessel was headed toward America and near America away from the scene of hostilities and in peaceful waters. Notwithstanding that in all four of these cases the war vessels were not engaged in combat or headed toward a combat zone the Court held by reason of their character as war vessels about their duty in time of war they were nonetheless engaged in a war-like operation within the meaning of that phrase in a marine insurance policy.

G. Discussion of Authorities Relied Upon by Appellant.

The authorities cited by appellant do not support its position. In *Harrisons, Ltd. v. Shipping Controller*, (1921) 1 K.B. 122, 15 Asp. M.C. 270, the merchant vessel *Inkonka*, navigating in a war zone and sailing without lights stranded.

She carried hospital stores for the British Government and was laden with troops and officers. The court felt that the vessel was not herself engaged in a warlike operation. It does not appear that this case was appealed and the decision in this respect is superseded by the House of Lords case of the *Geelong-Bonvilston*. 39 The Times L.R. 133; (1923) XIII Ll. L. Law Rep. 455, which held that a vessel carrying ambulance wagons and other Government stores to or from a war base was engaged in a warlike operation. Unlike the *Roustabout* the *Inkonka* was not a war vessel in the service of the military or naval service of her country.

Wynnstay Steamship Company, Ltd., and W. I. Radcliffe Steamship Co., Ltd. v. Board of Trade, (1925) 23 Ll. L. Rep. 278, was another King's bench case in which there appears to have been no appeal. There the *Sylvan Arrow*, a U.S. Navy tanker, after the Armistice dragged her anchor thereby coming into collision with the merchant vessel the *W. I. Radcliffe*. The *Sylvan Arrow* had been engaged in carrying oil to the U. S. Fleet but at the moment she had no orders. It was contended that the damage to the *W. I. Radcliffe* was a consequence of a warlike operation. According to the court " * * * she had carried oil, was prepared to carry it again and might carry it either for war ship or for anybody else. But she was not carrying it, and she was not going anywhere to fetch it. She had come back and was anchored awaiting orders * * * She was waiting there to see what was

to be done with her next." (Emphasis supplied.) Thus it clearly appears from the facts that the moment of collision the *Sylvan Arrow* was not engaged in any war duty, hence was not engaged in a warlike operation. Compare *Athel Line Ltd. v. Liverpool & London War Risks Assoc. Ltd.* (1945 Court of Appeals) 62 The Times L.R. 81 (infra) (approved by Lord Porter in the *Priam, Liverpool & London War Risks Insurance Assoc. Ltd. v. Ocean S.S. Co. Ltd.*, 63 The Times L.R. 594, 599; (1931 A.C. 23) where damage to a tanker engaged in a warlike operation and occasioned by grounding by reason of dragging her anchor was held to be a consequence of a warlike operation. Compare with *Roanoke-Trevarion* (*Supra*).

Clan Line Steamers, Ltd. v. Liverpool and London War Risks Insurance Assoc., Ltd., (the *Orlock Head*) (1943) 1 K.B. 209, was another lower court case, and involved not the carrying of munitions or war material but raw materials on a voyage to ports for distribution to munition factories. This case is distinguishable from the case at bar and not inconsistent with the leading English decisions in that her cargo was not for the purpose of waging offensive or defensive war and was not in any sense a military cargo.

In *Leyland Shipping Company, Ltd., v. Norwich Union Fire Insurance Society, Ltd.*, 34 The Times L.R. 221 (1918) A.C. 350, the torpedoing of a vessel was held to be the proximate cause of the loss and damage and hence a war risk

though the vessel did not sink and become a loss until after she was grounded in the harbor. This case is likewise consistent with leading English decisions and has been previously cited herein as sustaining the principle of proximate cause contended for by appellees.

Admiralty Commissioners v. Brynawel S.S. Co., 17 Ll. L. Rep. 89 (K.B. 1923) the vessel was held not to have been engaged in a warlike operation. A minesweeper, after the Admiralty had ceased minesweeping, went to a place for refueling by colliers. She was engaged in coaling and not engaged in any action preparatory to resuming a warlike operation. The case was not appealed. The opinion nevertheless recognizes that almost any movement of one of His Majesty's ships at sea in time of war constitutes a warlike operation. This is a so-called "bumping" case and may be considered consistent with leading English decisions on the basis that the vessel at the time was not engaged in a warlike operation or if so engaged, damage resulted solely from the action of wind and sea. The case was prior to the *Coxwold*, the *Atheltemplar* and the *Priam* and had the Court found the vessel engaged in a warlike operation the result no doubt would have been otherwise.

In the *Atheltemplar*, *Athel Line, Ltd. v. Liverpool & London War Risks Insurance Assoc., Ltd.*, (1945 Court of Appeals) 62 The Times L.R. 81 (appellant's brief p. 34), a chartered merchant tanker was carrying oil to a war base and came to rest at anchor when damage occurred to her hull

through dragging anchor. This case is more recent and of higher authority than the lower court case of the *Sylvan Arrow* (*Supra*). The Court of Appeals held the damage to be a consequence of a warlike operation. Although she was anchored and not actually proceeding to a war base at the time of the stranding this did not suspend her warlike operation or prevent the damages from being a consequence of a warlike operation within the meaning of that term in an insurance policy.

Appellant cites several American decisions. In *Standard Oil Co. v. St. Paul Fire and Marine Insurance*, 59 F. Supp. 470, the action was on an open cargo policy of marine insurance. Notwithstanding the assertion of appellant that "the *Petter* was clearly engaged in a warlike operation," the finding was otherwise. The case proceeded on the theory of a "seizure" within the authority of *Muller v. Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759. In *Meseck Towing Lines v. Excess Insurance Company, et al*, 77 F. Supp. 790 (E.D.N.Y. 1948) the court accepted the erroneous notion of proximate cause, as indicated in the *Queen Insurance Company case*. From the court's decision: "It appears that the war vessel at the time of the collision *had not entered upon the patrol duties which were to be performed * * **" On the other hand the *Roustabout* was actively engaged in her war duty in time of war. The case may be distinguished on the facts in that at the time of the collision she was not engaged in a warlike

operation. Other American cases cited by the appellant are inapplicable inasmuch as they do not involve the construction of the terms "consequences of hostilities or warlike operations" under a marine insurance policy.

Appellant's contention that the *Roustabout* was not engaged in a warlike operation at the time of the collision because she was designated "YO" meaning "yard oiler" is valueless in view of the showing of her actual services, i. e. she was a duly commissioned Naval vessel engaged in Naval duties in time of war *and in service of transporting petroleum products and munitions of war from war bases of supply in Seattle to active war bases in Alaska for use by its combat surface and aircraft in active war areas*. Her character and services did not change although she was returning at the time of the collision for the purpose of making another trip. Even while so doing she was carrying defective ammunition, empty torpedo cases and empty oil drums, which was an important part of her Naval duties. The appellant's further contention that the *Roustabout* was not engaged in a warlike operation because before the war she was a commercial vessel engaged in purely commercial commerce and because after the war she returned to commercial service does not make inoperative the fact that at the time of collision she was engaged in a warlike operation. The appellant's contention that the size or speed of the *U.S.S. Roustabout* makes a difference in her warlike character is likewise an

untenable argument in view of the actual showing that she was a war vessel engaged in a warlike operation at the time of collision. For the foregoing suggested propositions appellant offers no authorities. It is not enough for appellant to distinguish authorities on unimportant facts without applying well settled principles and authorities to the facts of the case at hand. The character of the vessel and the duty and services which she was performing at the time of the collision is paramount to such unimportant facts as her designation, size, and speed or that at one time or another she was engaged as a commercial vessel.

Appellant in its final attempt to overcome the overwhelming force of American and English decisions on the subject of marine insurance law introduces into the argument the so-called "over-all agreement." (1945 A.M.C. 1027). This so-called agreement is interesting but wholly irrelevant for it sets forth only what the parties thereto think the law is or should be and is binding on no one. It is noted appellant was not a signatory to the agreement and certainly appellees were not. The terms of the so-called "over-all agreement" by special provision are: "Without prejudice * * * and are not to be used by either party or by *third parties* as admissions with respect to legal liability." 1945 A.M.C. 1027, 1035 (Emphasis supplied). Even so, the *Roustabout* under the definitions therein is a "*warship*." Under Principle No. 3, 1945 A.M.C. 1032, it is clear that

the damage to the *Eastern Prince* was a result of war risk. Appellant's argument that the change in the F.C. & S. clause shows the intention of the parties is likewise of no significance. In fact, the stronger argument would be the other way, namely that the parties recognized the true construction to be placed upon the F.C. & S. Clause as determined by the *Coxwold* and in the face of this recognition, for economic and business reasons, changed the terms of the F.C. & S. Warranty and adjusted the premiums accordingly.

The *Priam, Liverpool and London War Risks Insurance Association, Ltd. v. Ocean S.S. Co., Ltd.*, 63 The Times L.R. 594 (1948) A.C. 243, is cited by appellant on pages 25 and 39. The House of Lords in this, its most recent decision, affirmed its holding in the *Coxwold*, to-wit, that damage to a vessel engaged in a warlike operation, whether caused by collision or stranding, is a consequence of a warlike operation; although damage to a vessel engaged in a warlike operation *caused solely by heavy weather would be a marine risk*. The *Priam* was admittedly engaged in a warlike operation. Damage to the forward part of the vessel, No. 2 hatch, occasioned by an element of the warlike operation was held to be a war risk, while other damage caused *solely* by heavy seas was held to be a sea risk. Reaffirming the rule that damage caused by a vessel in a stranding or collision is a consequence of a warlike operation. Lord Wright said:

"On the main issue, however, it seems to me that

there is a real difference of substance in this context between the ship striking a rock or colliding and being struck by a sea. It is true that it is while she is pursuing the contemplated warlike operation that the sea strikes her, and that her striking the rock or colliding is as little purposed as her being struck by a heavy sea. But in the former case she is an active agent *quoad* striking the ship or rock, in the latter she is merely passive. I think that this is a sufficient distinction on the authorities for this purpose.

* * *

"This House did indeed unanimously reverse the judgment of the Court of Appeal in *The Coxwold* (*supra*), partly on grounds of fact, but also on the grounds that the ship stranded while engaged on a warlike operation, that stranding was for this purpose equivalent to collision, and that therefore the decision was governed by express authority. Further than that the House did not decide. Outside of the particular concept of the "warlike operation" or particular war risks the sea peril remains and must still be held to the operative peril for which the marine underwriters continue to be liable, except in the case of collision, stranding or the like, due to the ship, a 'warlike operation' being actively directed into the obstacle on her warlike course. * * *"

Lord Sumner approved the holding in the *Coxwold* and in the *Atheltemplar*. He stated:

"In reaching a conclusion what those rights are your Lordships are, of course, bound by a series of previous decisions in this House beginning with *The Petersham* and *Matiana* (*supra*) and ending with *Yorkshire Dale Steamship Company, Limited v. Minister of War Transport (The Coxwold)* (58 *The Times* L. R. 263; (1942) A. C. 691), and it is neither advantageous nor indeed

possible to try to lay down a fresh standard. I have already stated in the last-mentioned case what I believe the results of the previous decisions to have been, and would only add that the opinions expressed in that case, or at any rate those of the majority, were to the effect that when a ship is engaged in the warlike operation of proceeding with war stores from one war base to another, a collision with another ship or a grounding which is the result of that operation is a war loss. The later case of *Athel Line, Limited v. Liverpool and London War Risks Insurance Association, Limited (The Atheltemplar)* (62 *The Times* L.R. 81, (1946) K.B. 117) in the Court of Appeal does not, I think, carry the principle any further. It is true that the vessel was at anchor, but she had deliberately put herself in the position in which she grounded so that it was her act which caused the loss, though she did not know what its consequences would be."

He further stated:

"As Lord Wright pointed out in *The Coxwold* (*supra*), the basis of the decisions seems to be that the casualty can be traced to definite action on the part of those on board the quasi-warship in directing the course of the vessel to carry out the warlike operation. That direction may take her into collision with another vessel, or on to a rock, but incidents may occur in the course of the voyages without being caused by such definite action on the part of those directing it. In the case of stranding or collision the progress of the ship brings her on to the rock or into the other vessel. The rock does not move; it is static. If the other vessel runs into her and it is that vessel's action which causes the injury, it is the progress of that ship and not that of the damaged vessel which causes the injury, and whether that injury is a war or marine loss depends on whether the other ship, not the damaged vessel, is engaged on a warlike operation or on an ordinary mercantile adventure."

Both Judge Bowen and Judge Foley following the leading English decisions on the subject agreed and determined that the *U.S.S. Roustabout* was engaged in a warlike operation and that the collision and damage to the *M/V Eastern Prince* was a consequence of a warlike operation. Judge Foley in his decision stated:

“* * * Considering the facts established by the evidence here as similar facts were considered in the *Roanoke* case (*Board of Trade v. Hain Steamship Co., Ltd.*, supra), we have no right in law or in fact to assume without evidence that the *Roustabout* was not engaged on the duty of the service of which she formed part of the Navy.

“The collision of the vessels *Roustabout* and *Eastern Prince* was due in part to the action of the *Roustabout* in a warlike operation. The damage to insureds’ vessel, *Eastern Prince*, was a consequence of warlike operations of the *Roustabout*, a duly commissioned vessel of the United States Navy officered and manned by naval officers and crew and operated by the Navy in aid of the prosecution of the war with Japan. The collision was a result of mutual fault of both vessels.” (R. 46)

H. *The Evidence is Clear that the Collision Occurred by Reason of the fault, at Least Contributing Fault of U.S.S. Roustabout while Engaged in a Warlike Operation.*

The District Court found:

“4. That the site of the collision is a narrow channel under the International Rules.

5. That at the time of said collision the *USS Roustabout* was at fault as follows:

(a) Failing to keep to the right of the channel;

(b) Failing within sight of the *Eastern Prince* to indicate a change of course on her whistle;

(c) Failing to keep a proper lookout in that the lookout aboard the *Roustabout* after sighting the red light of the *Eastern Prince* took no action concerning same and failed to notify the officer on the bridge of the whereabouts of the *Eastern Prince*." (R. 49).

The testimony was oral and the trial court had full opportunity to hear the witnesses and judge their testimony. While on appeal trial in admiralty is *de novo*, the findings of fact and conclusions of the trial court will not be disturbed by the appellate court unless the trial court is plainly wrong. *Portland Tug & Barge Co. v. Upper Columbia R. Tow. Co.*, (9 C.C.A. 1945), 153 F. (2d) 237, 238; *Matson Nav. Co. v. Pope & Talbot, Inc.*, (9 C.C.A., 1945) 149 F. 2d 295, 298; *Puratick v. United States*, (9 C.C.A., 1942) 126 F. 2d 914, 916; *The Heranger*, (9 C.C.A., 1939) 101 F. 2d 953, 957; *McLain Line, Inc. v. Pennsylvania R. Co.*, (2 C.C.A., 1937) 88 F. 2d 435, 436; *The Mabel*, (9 C.C.A., 1932) 61 F. 2d 537, 540. The trial court was so plainly right in its finding of fault on the part of the *Roustabout* there could be no other conclusion from the evidence.

(a) The *Roustabout* was at fault for violation of the Narrow Channel Rule.

The collision took place in Discovery Passage, British

Columbia, which runs northerly and southerly (R. 104). Both masters agreed that the site of the collision, Discovery Passage, was a narrow channel within the meaning of the Narrow Channel Rule, International Rule, Article 25. (R. 105, 159). At the time and immediately prior to the collision the *Roustabout* was being navigated in violation of the Narrow Channel Rule, that is, on the wrong side of the channel or in this instance on the easterly side or her left side of mid-channel (R. 105, 130, 160) Reference to the chart of Discovery Passage (Libelant's Ex. No. 2) shows an adequate depth of water on the westerly side of the channel (that is the *Roustabout's* right of mid-channel) and conclusively shows that it was safe and practicable for the *Roustabout* to navigate to her right side of mid-channel in compliance with the Narrow Channel Rule. Capt. Parks admitted that he could have with safety navigated to the right of mid-channel (R. 107).

The International Rules of the Road, Article 25, known as the Narrow Channel Rule provides:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." International Rules Art. 25, 33 USCA Sec. 110.

Thus the *Roustabout* was clearly guilty of violation of the statutory rule in navigating on the wrong side of a narrow channel.

(b) The *Roustabout* was at fault for failure to indicate change of course by whistle signal.

The *Roustabout* was clearly at fault for failure to indicate her change of course to port by a whistle signal of two blasts as required under International Rules of the Road, Article 28. The pertinent aspects of this rule are set forth as follows:

“* * * When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

* * * Two short blasts to mean, ‘I am directing my course to port.

* * *” (International Rules of the Road, Art. 28, 33 USCA Sec. 113).

The evidence of violation of the foregoing rule is undisputed and is found in the admission of Captain Larry Parks, Master of the *Roustabout* who testified as follows:

“Q. Prior to the collision did you observe the lights of the Eastern Prince? A. Yes, sir.

“Q. After observing the lights of the Eastern Prince and prior to the collision, was the course of the U.S.S *Roustabout* altered? A. Yes, sir.

“Q. Were any signals sounded in accordance with United States International Rule 28 upon the changing of that course? A. No, sir.

“Q. I mean sounded by the *Roustabout*? A. No, sir.”

The fault of the *Roustabout* in failing to signal her change of course is confirmed by Captain Rose of the *Eastern Prince* (R. 158) and the Quartermaster of the *Eastern Prince* (R. 133). Thus the *Roustabout* was clearly guilty of a further statutory fault in failing to signal a change of course as required under International Rules of the Road, Article 28.

(c) The *Roustabout* was at fault for failure to keep a proper lookout.

This fault is established by the testimony of the *lookout* aboard the *Roustabout* who testified:

“Q. When you saw the red light of the *Eastern Prince*, —and you did see it prior to the collision, didn’t you? A. Yes, sir.

“Q. You took no action whatsoever; I wrote down your answer. Is that correct? A. That is right.”

On direct examination he testified that the duties of the lookout on the *Roustabout* were “to watch for dangers to the ship * * * and to warn the commanding officer of any danger,” but he “was at a loss to take any action whatsoever” (R. 210, 211). The International Rules of the Road, Article 29, provide:

“Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordin-

ary practice of seamen, or by the special circumstances of the case.” (Emphasis ours.) International Rules of the Road, Art. 29, 33 USCA Sec. 121.

Thus the *Roustabout* was guilty of the further fault in failing to maintain a proper lookout.

Having shown statutory violations of the Rules of the Road, (a) violation of the Narrow Channel Rule, International Rules of the Road, Art. 25, (b) violation of International Rules of the Road, Art. 28, in failing to indicate change of course by whistle signal as required, and (c) violation of International Rules of the Road, Art. 29, in failing to keep a proper lookout, it follows from the rule of “*The Pennsylvania*” that the statutory faults of the *Roustabout* are presumed to have contributed to the collision. In such a case the burden rests upon the appellant to show that such breaches of statute not only probably did not contribute to the collision but they could not have done so. This fundamental admiralty rule, having its origin and particular application to admiralty cases, is stated in the *SS. Pennsylvania v. Troop*, 86 U.S. 125, as follows:

“The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, *it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably*

was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." (Emphasis supplied.)

To the same effect: *The Denali*, 105 F. (2d) 418, adhered to (CCA 9) 112 F. (2d) 952; *The Silver Palm*, 94 F. (2d) 754, 759 (CCA 9), Certiorari denied 304 U.S. 576; *The Princess Sophia*, 61 F. (2d) 339, 347 (CCA 9); *Puget Sound Navigation Co. v. Nelson*, 59 F. (2d) 697, (CCA 9); *Carr v. Hermosa Amusement Corp. Ltd. (Olympic-Sanito Maru)*, (9 CCA 137 F. (2d) 983, 987; *Lie v. San Francisco and Portland S.S. Co.*, 243 U.S. 291, 298, 61 L.Ed. 726, affirming the *Beaver-Selja*, (9 CCA) 219 F. 134, 137; *The Martello*, 153 U.S. 64; *Belden v. Chase*, 150 U.S. 674, 679; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U.S. 408, 422; *The E. Madison Hall*, 140 F. (2d) 589 (4 CCA); *The Bohemian Club*, (3 CCA) 134 F. (2d) 1000; *General Sea Foods Corp. v. J. S. Packard Dredging Co.*, (1 CCA) 120 F. (2d) 117.

Appellant has clearly failed to sustain this heavy burden of proof.

Appellant contends here as it did in the trial court that the situation was an "overtaking situation," as defined by International Rules of the Road, Art. 24, 33 USCA Sec. 109. If this contention be correct then it was the duty of the *Roustabout* to keep out of the way of the overtaken vessel, the *Eastern Prince*. This she failed to do and was thereby guilty of a plain statutory fault and must sustain the burden imposed by the rule of "*the Pennsylvania*."

The evidence and the law in the case clearly establish the fault of the *U.S.S. Roustabout* and hence under Judge

Bowen's decision, Judge Foley's decision and the leading American and English authorities on the subject, the collision and loss and damage to the *M/V Eastern Prince* was a consequence of a warlike operation as that term is understood in marine insurance.

II. Appellees are Entitled to Interest.

In Admiralty, interest on claims arising out of breach of contract is a matter of right. This action is on a contract of insurance. The District Court allowed interest on the contract from the 11th day of September 1942, the date the claim was presented to the appellant for the agreed sum of \$11,031.29. The claim, it is admitted, was accompanied by the General and Particular Average Statement and liability thereupon denied as admitted in the pleadings. (Para. 5 Amended Libel, R. 5, para. 5 Answer, R. 37). It is stipulated that the statement of claim was properly stated (Stipulation of Facts re Amount of Loss R. 38-40) and the agreed sum was found due by the Court (R. 50).

In *Benedict on Admiralty* it is stated:

"Sec. 419. Interest on Damages.

"In admiralty, interest on claims arising out of breach of contract is a matter of right but the allowance of interest on damages in cases of collision, or other tort or for unliquidated damages, is always in the discretion of the court and such interest may be allowed or disallowed by the district court or on appeal by the Circuit Court of Appeals or by the Supreme Court. The rate of

interest adopted is that allowed by statute in the courts of the State. * * *” (Vol. 3 Benedict on Admiralty 191, 6th Edition).

The appellees are entitled to interest at 6 per cent on the amount due under the insurance policy from the date of demand for payment pursuant to the statement of account marked Libelants’ Exhibit 5, admitted in evidence without objection. (R. 220).

A general average statement is an account stated against the underwriters. In *Gulf Refining Co. v. Universal Insurance Co.*, 32 F. (2d) 555, 557 (2 CCA 1929), the court stated:

“The general average statement determined the debt due from each set of underwriters.”

In *Kohler & Phase v. United American Lines*, 60 F. (2d) 530, 533 (S.D. N. Y. 1932), the court stated:

“In my opinion, a general average statement is merely the statement of an account.”

There being no dispute as to the account stated, except as to the liability by reason of coverage, the claim is calculable by mathematical process. A claim for damages calculable by mathematical process should include interest. See *Steeves, et al v. American Mail Line, Ltd.*, (9 CCA 1948) 156 F. (2d) 59, where interest was allowed at 6 per cent in a case in the District Court for Washington.

Interest at 6 per cent in the State of Washington is allowed on contracts where determinable by computation, *United States v. Skinner & Eddy Corp.*, (9 CCA), 35 F. (2d) 989. See also *Seattle Curb Exchange v. Knight*, (9 CCA) 59 F. (2d) 39. In the courts of the State of Washington it is proper to allow interest on insurance claims from the time the claim becomes payable.

“Interest on money detained after it is due and payable is recoverable as a matter of legal right. *Wood vs. Cascade Fire, etc. Ins. Co.*, 8 Wash. 427, 431.” 36 Pac. 267.

Even where the amount due is in controversy and unliquidated, it has been held proper to allow interest for money detained on a claim under an insurance policy. *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 157. 39 Pac. 380.

Following the rational of the Ninth Circuit and applying a similar interest statute of the State of California, interest is payable in the case at bar for the reason that the sum set out in the proof (Statement of General and Particular Average—Libelants’ Ex. No. 5) was the amount found due by the Court. It was stated in *National Union Fire Ins. Co. v. California Credit Corp.*, (9 CCA) 76 F. (2d) 279, 290:

“If proofs of loss filed by insureds * * * set out the claims in the manner and amounts as subsequently found due by the trial court, it would seem to follow from the above cases that interest would be allowable from the date payment became due under the policy.”

Interest has been properly allowed in admiralty on a policy of war risk insurance issued by the United States in the case of *Standard Oil Co. v. United States* (Llama), 267 U.S. 76, 69 L. Ed. 519.

In the *Naiwa* (4 C.C.A.) 3 F. (2d) 381, 384, the District Court allowed interest on \$27,500.00, the amount of out-of-pocket cost incident to salvage services, and the court on appeal stated:

“We are not inclined to disturb the finding of the lower court in the matter of the allowance of interest.”

With respect to collision cases the general rule is to allow interest. In *Managua Nav. Co. v. Aktieselskabet Borgestad*, 7 F. (2d) 990, 994, the Court of Appeals stated:

“The general rule is to allow interest from the date of the collision. *The Manitoba*, 122 U.S. 97, S. Ct. 1158, 30 L. Ed. 1095; *Galveston Towing Co. v. Cuban S.S. Co.*, 195 F. 711, 115 C.C.A. 438; *The El Monte*, 252 F. 59, 164 C.C.A. 171. Nothing in this case appears to justify an exception to the general rule, and the decree would fall short of indemnifying the owner of the Borgestad for the loss it sustained, if interest is not allowed on the amount of such loss from the time it was actually sustained.”

It is an abuse of discretion for the District Court in a case of collision damages to refuse to allow interest in the absence of “peculiar facts” causing the denial of interest. *The President Madison* (9 C.C.A.) 91 F. (2d) 985.

In this case the libel proceedings were filed September

17, 1942, the collision having occurred May 11, 1942. Proceedings were instituted immediately following presentation of the claim and denial of liability by appellant. November 9, 1942 (50 days later) appellant filed "preemptory and dilatory exceptions." By reason of the nature of the case it was necessary for both parties to prepare and file extensive briefs. Appellees exceptions were noted December 20, 1943. The hearing was continued to January 3, 1944 *at the request of the appellant*. It is to be noted at this point that appellant had equal opportunity and right to note the exceptions for hearing. On May 31, 1944, District Judge Bowen announced his decision, the Court in the meantime having considered exhaustive briefs and extensive oral arguments. The decision of District Judge Bowen established the law of the case and appellant's liability for payment, and thereafter appellant was in a position to bring the case on for trial. Appellant's answer was filed on September 8, 1944 (99 days after Judge Bowen's decision sustaining the allegations of the libel), and appellant will not deny that thereafter and on many occasions appellees requested appellant to stipulate facts of an undisputed nature and familiar to both parties in order to expedite the final disposition of the case, save expense of trial and avoid the difficulties of taking depositions and getting together far-flung witnesses at a time when such effort was impeded, if not impossible, during wartime. It is to be noted that appellant had equal opportunity to bring the case on for trial.

On October 7, 1946, the parties *jointly* requested the case not then to be set for trial, pending the arrangement for witnesses to appear at the trial. Shortly thereafter the parties agreed on a trial date during January, 1947, and thereafter the case was continued for trial to July, 1947, on the court's own motion.

The trial began on July 16, 1947, and was completed on July 17, 1947. At the conclusion of the evidence the District Court announced its readiness to make oral findings in favor of appellees. The Court indicated that further briefs in addition to the trial briefs were unnecessary, but at appellant's insistence and request an extension of time was granted to submit briefs. (R. 222, 223, 224, 225, 226, 227.)

The mere lapse of time between a timely filing of a libel and final determination by trial of the case is no reason to refuse interest. The rule as stated in *Benedict on Admiralty* is as follows:

“Grave unexcused delay on the part of the libelant in beginning or prosecuting the action is a discretionary ground for denying in whole or in part the award of interest.” Vol. 3 *Benedict on Admiralty* (6th Edition) 193.

The record does not show nor does the appellant contend that there was any “grave unexcused delay on the part of the libelant in beginning or prosecuting the action” or that there are “peculiar facts” which would justify the Court in disallowing interest.

Furthermore, contrary to appellant's contention, the equities of the case are all in favor of appellees who advanced sums and paid losses and damages for which they have been out-of-pocket over all these years. Appellant determined to withhold payment of the claim under its policy when presented with the claim and payment thereof demanded on September 11, 1942.

Despite appellant's present contention with respect to interest, all of which it made to the trial court, the trial court after a full examination and consideration of the record including the clerk's docket entries showing the events and progress of the case concluded as a matter of right or in the exercise of sound discretion that interest was properly allowable from September 11, 1942 (R. 52). The appellant has shown no abuse of the Court's discretion in this connection.

III. Conclusion

It is respectfully submitted that the decree of the District Court should be affirmed.

Respectfully submitted,

BOGLE, BOGLE & GATES

STANLEY B. LONG

THOMAS L. MORROW

Proctors for Appellees

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA,
A Corporation, *Appellant,*
v.
HENRY O. LINK, E. W. ELLIOTT and O. L. GRIMES,
Appellees.

REPLY BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE ROGER T. FOLEY, *Judge*

SKEEL, MCKELVY, HENKE,
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for the Second Circuit

1901

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ARGUMENT

It is conceded by appellees in their brief that appellant is not liable as war risk insurer unless:

1. At the time of the collision in question the *Roustabout* was engaged in a warlike operation.
2. The collision was proximately caused by that warlike operation, and
3. The *Roustabout* was at least partially at fault.

Appellees contend that each of these three conditions of liability is satisfied by the facts of this case.

We submit that not one of those three conditions of liability is satisfied by the facts of this case.

I.

The Roustabout Was Not Engaged in a Warlike Operation

Appellees do not deny that at the time of collision the *Roustabout* was sailing under peacetime conditions: Her navigation lights were burning; she was not zigzagging; she was not sailing upon an unusual course nor at an unusual speed; she was not in convoy; she was not under naval escort, and all shore aids-to-navigation were in operation.

In support of their contention that the *Roustabout* was at the time of the collision engaged in a warlike operation appellees rely entirely upon the following:

(a) The *Roustabout* was an armed and commissioned vessel of the United States Navy manned by United States Naval personnel (Appellees' Brief 31).

(b) The *Roustabout* was engaged in shuttle service between Seattle and war bases in South-eastern Alaska (Appellees' Brief 32), and

(c) That upon her southbound voyages the *Roustabout* "would return cargo of all description, including defective ammunition, empty oil drums, empty torpedo cases, and her purpose in returning to Seattle was to reload with petroleum products and dry cargo, bombs, torpedoes, etc., for the Navy and go North again to war bases in Alaska." (Appellees' Brief 32).

The decided cases, however, make clear that neither singly nor in combination are such facts sufficient to cause a vessel to be engaged in a warlike operation.

a. The fact that the *Roustabout* was an armed and commissioned vessel of the United States Navy, manned by United States Naval personnel, did not cause her to be engaged in a warlike operation.

There have been a number of decided cases in which an armed and commissioned naval vessel has been involved in a collision during wartime. In none of those cases has it been held that the naval vessel in question was engaged in a warlike operation simply because of the fact of her being in the naval service of a sovereign power.

In *Attorney General v. Ard Coasters, Ltd.* (1921) 2 A. C. 141, the British destroyer *H.M.S. Tartar* was held to have been engaged in a warlike operation. This holding was not founded upon the fact that the *Tartar* was an armed and commissioned vessel of the British Navy, but rather upon the fact that she was at the time engaged in the clearly warlike operation of patrolling for submarines.

In *Liverpool and London War Risks Ins. Assn., Ltd., v. Marine Underwriters of S. S. Richard de Larrinaga* (1921) 2 A. C. 141, the British cruiser *H.M.S. Devonshire* was held to have been engaged in a warlike operation, not because she was an armed and commissioned vessel of the British Navy, but rather because she was at the time steaming at best speed in a blacked-out condition in order to pick up and escort a convoy to its destination.

In *Charente Steamship Co., Ltd., v. Director of Transports*, 38 T.L.R. 148, the United States naval vessel *America* was held to have been engaged in a warlike operation, not, however, because she was an armed and commissioned vessel of the United States Navy, but rather because she was at the time engaged in transporting troops to France.

In *Wynnstay S.S. Co., Ltd., v. Board of Trade*, 23 Ll. L. Rep. 278 (K. B. 1925) the United States naval

vessel *Sylvan Arrow* was held not to have been engaged in a warlike operation notwithstanding the fact that she was an armed and commissioned vessel of the United States Navy.

Likewise, in *Meseck Towing Lines v. Excess Insurance Company, et al.*, 77 F. Supp. 790 (E.D.N.Y. 1948) the *U.S.S. S. C. 1294* was held not to have been engaged in a warlike operation, notwithstanding the fact that she was an armed and commissioned vessel of the United States Navy.

In light of the foregoing decisions, and others could be cited, the fact that the *Roustabout* was an armed and commissioned naval vessel is entirely consistent with her being engaged in either a warlike or a non-warlike operation.

In this connection it is to be noted that in each of the following collision cases one or both of the colliding ships had been requisitioned by a sovereign power:

Larrinaga Steamship Co., Ltd., v. Regem
(1945) A. C. 246, 61 T. L. R. 241;

Liverpool and London War Risks Assn., Ltd., v. Ocean Steamship Co., Ltd., (1948) A. C. 243;

Attorney General v. Adelaide Steamship Co., Ltd., (1923) A. S. 292;

Harrisons, Ltd., v. Shipping Controller (1921)
1 K. B. 122;

Clan Line Steamers, Ltd., v. Board of Trade,
(1929) A. C. 514.

In each of those cases the requisitioned vessel was as much subject to the command and direction of the sovereign as was any vessel in the navy of that sovereign. Yet, in not one of those cases did the court allude to that fact as tending to establish that the vessel was engaged in a warlike operation. Each court tacitly recognized that a requisitioned vessel may as well be engaged in a non-warlike operation as in a warlike operation.

The principle is well established that the character of a vessel does not determine the character of its operation. The fact that the *Roustabout* was an armed and commissioned vessel of the United States Navy does not in consequence even tend to establish that she was engaged in a warlike operation at the time of collision.

b. The fact that the *Roustabout* was engaged in shuttle service between Seattle and war bases in Southeastern Alaska did not cause her to be engaged in a warlike operation when returning from Alaska to Seattle in ballast.

Appellees place great reliance upon the fact that the *Roustabout* was engaged in a shuttle service between Seattle and Alaska as establishing that she was engaged in a warlike operation when proceeding in ballast from Alaska to Seattle. The argument of appellees

is that, since the carriage of petroleum products from Seattle for the use of boats and planes in Southeastern Alaska was a warlike operation, the return voyage was likewise a warlike operation.

It might just as well be argued, however, that, since a voyage in ballast from Southeastern Alaska to Seattle is clearly non-warlike, a voyage from Seattle to Alaska is likewise non-warlike. This latter argument is without merit but it points up the fallacy of attempting to ascribe to a "round voyage" the character of one of the legs of that voyage.

As pointed out in appellant's opening brief, in *Lar-rinaga Steamship Co., Ltd., v. Regem* (1945) A. C. 246, 61 T. L. R. 241, a recent case arising out of World War II, the House of Lords was faced with the precise problem before this court of characterizing one leg of a "round voyage." (Appellant's opening brief 32). In that case the House of Lords was unequivocal in holding that the whole of a "round voyage" is not characterized by the warlike character of one leg of that voyage.

Appellees have seen fit in their brief to ignore completely this decision of the House of Lords. That decision, however, cannot so easily be brushed aside. It is in this case precisely in point; and it is precisely contrary to the position taken by appellees. The clear

holding of *Larrinaga Steamship Co., Ltd., v. Regem* is that a "round voyage" is not to be characterized by one leg of that voyage but rather that the character of each leg of the voyage is to be determined upon its own facts.

That decision demands that in the present case the warlike or non-warlike character of the *Roustabout's* voyage from Alaska to Seattle be determined upon the facts of that voyage alone without reference to the character of any voyage which may have preceded it or which may have followed it.

Upon the authority of that case this court cannot, we respectfully submit, look beyond the particular voyage from Southeastern Alaska to Seattle upon which the *Roustabout* was engaged at the time of her collision with the *Eastern Prince*. If that single southbound voyage was in and of itself a warlike operation, the *Roustabout* was engaged in such an operation. If that voyage was in and of itself not a warlike operation, then the *Roustabout* was not engaged in a warlike operation at the time of the collision.

c. The fact that the *Roustabout* customarily carried miscellaneous dry cargo upon her southbound voyages cannot characterize the voyage in question as a warlike operation.

It is uncontroverted that at the time of the collision

the *Roustabout* was an armed and commissioned and naval vessel; that she was proceeding in ballast; that her navigation lights were burning; that she was not zigzagging; that she was not sailing upon an unusual course or at an unusual speed; that she was not in convoy or under escort; that she was returning to Seattle after having carried petroleum products to bases in Southeastern Alaska; and that all shore aids-to-navigation were in operation.

Upon those facts without more, the *Roustabout* was clearly not engaged in a warlike operation. As has already been shown, neither the fact that she was a naval vessel nor the fact that she was returning from a voyage to a war base, has the effect of characterizing her return voyage as a warlike operation.

In order to sustain their position, appellees must point out facts additional to those conceded. The sole additional fact to which they point is that "south-bound she would return cargo of all descriptions, including defective ammunition, empty oil drums, empty torpedo cases," (Appellees' Brief 32). At one time or another the *Roustabout* may have carried defective ammunition and empty torpedo cases southward from Alaska. What she may have carried at one time or another, however, is without significance as regards the voyage in question. Only the character of the cargo

which she was at the time actually carrying is significant in characterizing that voyage. As to the character of that cargo, only one thing is certain—it was almost entirely salt water, carried as ballast.

As to the character of the dry cargo, if any, actually aboard the *Roustabout* at the time, the record is bare. There is testimony as to what it might have been, but not one word as to what it actually was.

The court found that upon her southbound voyages the *Roustabout* carried “empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles.” (Ap. 48). In the absence of direct evidence to the contrary, it is but conjectural to assume that at the time of collision the *Roustabout* was carrying anything more warlike than empty containers and oil drums.

The carriage of such cargo is certainly a non-warlike operation if the carriage of a cargo 16 per cent of which was for the military authorities was non-warlike:

Clan Line Steamers, Ltd., v. Board of Trade,
(1929) A. C. 514;

if the carriage of iron ore was non-warlike:

Britain Steamship Company, Ltd., v. The King,
(1921) 1 A. C. 99;

if the carriage of steel rounds to be used in the manufacture of shells for the French Army was non-warlike:

Clan Line Steamers, Ltd., v. Liverpool & London Insurance Assn., (1943) 1 K. B. 209, 58 T. L. R. 369;

and if the carriage of raw material for the manufacture of smokeless powder was non-warlike:

Nordling v. Gibbon, 62 F. Supp. 932 (1945 S. D. N. Y.).

Appellees argue that it is immaterial what the *Roustabout* was carrying or in which direction she was going (Appellees' Brief 40).

It is true, in general, that the cargo or direction of voyage of a *warship* may be immaterial as regards the character of its operation. A warship, almost by definition, enters upon a warlike operation when it enters upon the duties for which it was designed. For example, the British destroyer *Tartar* (Appellees' Brief 40) was obviously upon a warlike operation when it was patrolling for submarines. So also was the British cruiser *Devonsire* when it was proceeding at best speed in a blacked-out condition in order to pick up and escort a convoy to its destination.

The immateriality of cargo or direction of voyage as regards a *warship* cannot, however, be carried over to

vessels which are not warships. For example, the *Warilda* decision (Appellees' Brief 40) rested upon the fact that the *Warilda* was at the time carrying over 600 doctors and wounded men from the battlefields of France. The *Roanoke* decision (Appellees' Brief 40) was based upon the fact that not only was she a warship but she was carrying over seven hundred live mines.

A warship becomes warlike merely by engaging in the duties for which she was designed. A cargo vessel, on the other hand, not being inherently warlike, becomes so by virtue of the cargo she carries, and this is true, as has been shown, whether she be a merchantman or a naval vessel. When she carries steel rounds for the manufacture of shells or raw materials for the manufacture of smokeless powder, she is upon a non-warlike operation.

Clan Line Steamers, Ltd., v. Liverpool & London Insurance Assn., (1943) 1 K. B. 209, 58 T. L. R. 369;

Nordling v. Gibbon, 62 F. Supp. 932 (1945 S. D. N. Y.).

When that same vessel carries ammunition or airplanes or tanks, she is upon a warlike operation.

Despite the argument of appellees to the contrary (Appellees' Brief 40) it is clear that the character of a cargo vessel's operation can be determined only by

reference to her cargo. Her holds may be filled with oats—or they may be filled with bombs. In the case of the *Roustabout*, her holds were filled with sea water, the least warlike of cargoes. We submit that the character of the voyage of the *Roustabout*, in common with all cargo ships, must partake of the character of that sea water.

II.

The Collision Was Not Proximately Caused by a Warlike Operation

In their brief, appellees concede that a loss is a war risk loss only if it is proximately caused by a warlike operation. They cite various definitions of “proximate cause.” (Appellees’ Brief 25-30). Those definitions are in general agreement that the proximate cause of a loss is the “efficient cause” of that loss. (Appellees’ Brief 28).

If that definition of proximate cause is applied to the facts of this case, it is apparent that the alleged warlike operation of the *Roustabout* was not the efficient cause of the collision.

If the *Roustabout* were, as argued by appellees, engaged in a warlike operation when proceeding southward, she was so engaged only by reason of the fact that she was carrying a warlike cargo northward or by

reason of the fact she was carrying a warlike cargo southward. Had the *Roustabout* carried no cargo northward and was carrying no cargo southward, she would have been no better able to avoid a collision with the *Eastern Prince*. In other words, the character of her cargo, the only factor which could possibly have characterized the *Roustabout's* operations as warlike, did in no respect contribute to the accident.

Can it be said then that the *efficient* cause of the collision was the alleged warlike operation upon which the *Roustabout* was engaged? The American decisions are unanimous in holding that it cannot.

Queen Insurance Company v. Globe & Rutgers Fire Insurance Co., 263 U. S. 487, 68 L. ed. 402 (1923);

Standard Oil Co. v. St. Paul Fire and Marine Insurance, 59 F. Supp. 470 (S. D. N. Y. 1945);

Ferro v. United States Mail Lines and United States of America, 74 F. Supp. 250 (S. D. N. Y. 1947);

Daronowich v. United States of America, 73 F. Supp. 1004 (S. D. N. Y. 1947);

Meseck Towing Lines v. Excess Insurance Company, et al., 77 F. Supp. 790 (E. D. N. Y. 1948).

The English cases, we submit, are in accord. In *Yorkshire Dale Steamship Co., Ltd., v. Minister of War Transport*, (1942) A. C. 691, 58 T. L. R. 263, the case

much relied upon by appellees (Appellees Brief 12-16), the *Coxwald* was stranded while proceeding in convoy to Norway with petrol for the British Forces there. Appellees argue that this case stands for the principle that any collision loss sustained in a warlike operation is proximately caused by that operation (Appellees' Brief 13-16).

We do not so read that decision. The Lord Chancellor expressly stated at 58 T. L. R. 264:

"Authority is hardly needed for the proposition that you do not prove that an accident is 'the consequence of' a warlike operation merely by showing that it happened 'during' a warlike operation."

Lord MacMillan stated at 58 T. L. R. 266:

"... to place liability on the Minister it is not enough that the casualty arose in the course of a warlike operation."

How then did the House of Lords find that the loss sustained by the *Coxwald* was proximately caused by her warlike operation?

The facts of that case were that the *Coxwald* was in convoy, that the convoy was zigzagging, that prior to the stranding the convoy had made an alteration of course to starboard in order to avoid what was thought to be an enemy submarine, and that finally the strand-

ing would not have occurred had the alteration in course not been made.

Upon those facts the Lord Chancellor was able to say at 58 T. L. R. 265:

“... In the present case, where the finding is that so substantial a deviation from the normal course was ordered for the express purpose of avoiding an enemy submarine, and was not subsequently corrected, there is no reason for saying that the arbitrator, in finding that the loss was the direct consequence of a warlike operation, was disregarding what had been already laid down by this House.”

Lord MacMillan said at 58 T. L. R. 266:

“Certainly the vessel would not have gone ashore where she did but for the order which she received and obeyed to change her course to the eastward to avoid apprehended enemy action.”

Lord Porter said at 58 T. L. R. 270:

“One must, I think, take the whole story—a ship sailing on a warlike operation at speed in dangerous waters where unexpected currents might be found, in convoy without lights following an ordered course and deviating from it again under orders for the purpose of avoiding actual or imagined submarine attack. I do not think that any one of these factors can be neglected in arriving at the cause of the loss.”

One may search the “whole story” of the *Roustabout* in vain for such factors connecting the loss in question with the warlike operation upon which the *Roustabout*

was allegedly engaged. In the absence of such factors, we submit that the *Coxwald* decision is inapplicable and that the alleged warlike operation of the *Roustabout* was not the proximate cause of the loss sustained by the *Eastern Prince*.

III.

The Roustabout Was in No Way at Fault.

We shall answer in order the arguments of the appellees as regards the fault of the *Roustabout*.

a. The Roustabout was not at fault for violation of the Narrow Channel Rule.

In order to attribute fault to the *Roustabout* appellees have deemed it sufficient:

1. To establish that the site of collision was within a Narrow Channel.
2. To quote the Narrow Channel Rule and
3. To establish that the *Roustabout* was not proceeding to her starboard of the mid-channel.

Appellant concedes each of these three facts and yet denies that the *Roustabout* was thereby at fault.

The Narrow Channel Rule provides as follows:

“In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of

the fairway or mid-channel which lies on the starboard side of such vessel." International Rules Article 25, 33 U. S. C. A. Sec. 110.

It is perfectly obvious that the Narrow Channel Rule was designed to avoid collisions only as between vessels approaching each other. By requiring that each vessel keep to its starboard of the mid-channel this rule has the same effect as a center line upon a highway.

The rule in no way tends to lessen the risk of collision between vessels proceeding in the same direction. As regards such vessels, the rule confines their navigation to the same side of the mid-channel line and thereby actually increases, rather than decreases, the risk of collision between them.

If one of two approaching vessels violates the Narrow Channel Rule, it is clear that that vessel is presumably at fault if the vessels collide.

Commonwealth and Dominion Line v. Seaboard Transp. Co., 258 Fed. 707 (D. C. Mass. 1919).

If each of two vessels proceeding in the same direction complies with the Narrow Channel Rule and stays to its starboard side of mid-channel, it is clear that the rule has no application to a collision between those vessels. It is demonstrable that the Narrow Channel Rule is also out of the case if each of two vessels pro-

ceeding in the same direction violates the Narrow Channel Rule.

Assume that vessel A is proceeding in a narrow channel and that vessel B is proceeding in the same channel some distance astern of A. Assume also that there are no approaching vessels and that A and B are both proceeding to the port of mid-channel. Assume further that B is overtaking A and intends to pass to the right or starboard side of A.

Under those circumstances B has the duty of keeping out of the way of A. At the same time A is under a duty to maintain her course and speed. The International Rules of the Road Article 21, 33 U. S. C. A. Sec. 106, provides as follows:

“Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.”

Now, assume that A should veer off to the right, directly into the path of B, so that the latter vessel cannot avoid colliding with A. Could A, under those circumstances, invoke the Narrow Channel Rule in order to charge B with fault? We respectfully submit that A could not, for as to vessels proceeding in the same direction the risk of collision is no greater when both vessels adhere to that rule than when both vessels disregard it. It was not designed to avoid collision

between them and cannot be invoked when such a collision occurs.

The *Eastern Prince* in the case at bar is in the precise position of vessel A, for as to the *Roustabout*, it is clear that the *Eastern Prince* was an overtaken vessel. She displayed no red and green navigation lights to indicate her true character as an approaching vessel (Ap. 113). The court so found (Ap. 49) and the appellees do not challenge that finding.

To the *Roustabout* the *Eastern Prince* represented: "I am proceeding in the same direction that you are. I am not an approaching vessel, so you may safely disregard the Narrow Channel Rule." In reliance upon that representation, the *Roustabout* did disregard the Rule. Now, after luring the *Roustabout* into that reliance, the *Eastern Prince* cannot be permitted to reveal her true identity and then say to the *Roustabout* immediately prior to the collision: "I wasn't an overtaken vessel after all. I'm an approaching vessel and you are at fault for being to the port of mid-channel."

Appellees argue that if this was in fact an "overtaking situation," the *Roustabout* was "guilty of a plain statutory fault" since she obviously failed to keep out of the way of the *Eastern Prince*. (Appellees' Brief 56).

That argument is, of course, not tenable. The duty

of the overtaking vessel is in reality not an absolute duty to avoid the overtaken vessel. For example, in *The Helen*, 204 Fed. 653 (D. C. N. J. 1913) the overtaking vessel was held blameless when the overtaken vessel stopped so suddenly that collision was unavoidable.

The duty of the overtaking vessel is rather a duty to take seasonable steps to avoid the overtaken vessel and she is not at fault unless she was guilty of some negligence or want of care.

The Grace Girdler, 7 Wall. 196, 19 L.ed. 113 (1868)

In the case at bar the *Roustabout* did take the requisite seasonable steps to avoid the *Eastern Prince*. Captain Parks of the *Roustabout* testified as follows: (Ap. 113)

- Q. Then as you continued to approach the *Eastern Prince*, what opinion did you form as to the direction in which she was going?
- A. I thought she was going in the same direction we were.
- Q. In other words, you assumed that you were actually overtaking the *Eastern Prince*?
- A. That is right.
- Q. Counsel has referred to the change that you made in your course. Can you explain the nature of that change?

A. As we got closer to the other vessel, which later developed to be the *Eastern Prince*, the angle of the other vessel—the angle of the bow was closer; we were getting closer to it. So I hauled the *Roustabout* a little further to the left, still thinking we were overtaking it and passing too close to it.

Q. So that you turned your vessel in towards the left or portside with the thought of allowing additional space as you passed the vessel that you thought you were overtaking?

A. That is correct.

Q. During this entire period were you continuing to observe the *Eastern Prince*?

A. Yes, sir.

Had the *Eastern Prince* been what she purported to be, there would clearly have been no collision. Since she was not what she purported to be, she cannot invoke the Narrow Channel Rule in order to ascribe fault to the *Roustabout*.

b. The Roustabout was not at fault for failing to indicate a change of course by whistle signal.

It is true that Article 28 of the International Rules of the Road provides as follows:

“... When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

... Two short blasts to mean, ‘I am directing my course to port.’ ...” (33 U. S. C. A. Sec. 113)

After the *Eastern Prince* exposed her red light, the *Roustabout* made a change of course but did not sound a whistle signal. There are two reasons why the *Roustabout* was not at fault in failing to sound that signal.

In the first place when the *Eastern Prince* suddenly shed its character as a southbound vessel, the captain of the *Roustabout* found his vessel placed in a position of extreme peril. The captain testified as follows (Ap. 114) :

Q. During this entire period were you continuing to observe the *Eastern Prince*?

A. Yes, sir.

Q. When did you first become conscious of the fact that you were not overtaking the *Eastern Prince* in the sense that the vessel was going the same direction that you were and that you were overtaking it from the rear?

A. We were getting very close together and I believe the *Eastern Prince* hauled hard right. When they did so, I saw their red light then and I hauled the *Roustabout* hard left and went full astern.

Appellees do not contend that the emergency orders of "hard left" and "full astern" were improper. They contend that the captain should have in addition sounded a whistle signal to indicate his change in course.

It is well established that mistakes are excused if committed in moments of sudden peril and excitement.

caused by the misconduct of another vessel. In *The Lafayette* (C. C. A. 2d 1920) 269 Fed. 917 at 925, the court said:

“... if one vessel places another in a position of extreme danger by wrongful navigation, the other ship is not to be held to blame if she does something wrong and is not navigated with perfect skill and presence of mind.”

In *The S.S. Bylayl*, 49 F. Supp. 439 (S. D. N. Y. 1943), it was held that this *in extremis* rule applies to the failure to sound a whistle signal. At 49 F. Supp. 443 the court said:

“That the *Bylayl* did not blow a signal when she went ‘hard left’ and continued on at full speed in an effort to avoid the *Vacuum* should not condemn her. She was confronted with a sudden critical situation, and if those in charge of her navigation committed an error, it was only some thirty seconds before the collision and was a situation *in extremis* . . .”

If the failure to signal the course change was a mistake, we submit that it was clearly excused by the fact that the *Eastern Prince* had placed the *Roustabout* in a position of extreme peril.

The failure to sound a signal was moreover excused by the fact that it in no way contributed to the collision.

Captain Rose of the *Eastern Prince* testified as follows (Ap. 203):

Q. (By Mr. Henke): When you first sighted the *Roustabout*, where was it in relation to your vessel?

A. Well, he was three miles or more away northward in the channel. I was going north and he was coming south. I was bucking a flood tide; he was coming with the flood tide. He was coming very rapidly. I was moving over the ground very slowly. We were both on the right-hand side of the channel. When I saw him, I expected that he would go to his right, which he did not do.

Q. What direction was his vessel moving in relation to yours?

A. Well, I should say he was about three or four points off my bow, coming toward me.

Mr. Long: Which bow, port or starboard?

The Witness: Port—the left-hand side of the ship.

Q. (By Mr. Henke): You took what action then; what did you do then?

A. Then I proceeded on my course, and when I saw that his lights had changed their range and if he continued on that course that he would jeopardize me, I turned to the right.

Q. You turned to the right. What did you do after you turned to the right?

A. I opened up his port light, shut out his green light, I steadied my ship and proceeded north on my course of 312 degrees.

Q. I believe you gave a whistle signal at that time?

A. No.

Q. No?

A. Then his green light came into view again which meant danger for me. Then I told my Quartermaster, "Put the wheel hard a'port," and at the same time I reached up and blew one blast of the whistle.

The testimony of Captain Parks of the *Roustabout* was as follows (Ap. 114):

Q. When did you first become conscious of the fact that you were not overtaking the *Eastern Prince* in the sense that the vessel was going the same direction that you were, and that you were overtaking it from the rear?

A. We were getting very close together and I believe the *Eastern Prince* hauled hard right. When they did so, I saw their red light then and I hauled the *Roustabout* hard left and went full astern.

From the foregoing testimony it becomes apparent that when the *Roustabout* was first able to see the red light of the *Eastern Prince* the latter was swinging to the right by reason of the "hard a'port" order of her captain. Now, had the captain of the *Roustabout* sounded his whistle at that time, the captain of the *Eastern Prince* could not thereby have been able to avert the impending collision. He could not have shifted

his rudder to "hard left," for that would have taken the *Eastern Prince* toward rather than away from the *Roustabout*. He could not have turned more sharply away from the *Roustabout*, for his rudder was already at its extreme right position. As a matter of fact, at the time he gave the order "hard a'port," the captain of the *Eastern Prince* had already decided that a collision was inevitable and had decided to take the impact upon the stern of the *Eastern Prince* (Ap. 158). Certainly, under those circumstances, it cannot be urged that the failure by the *Roustabout* to signal its emergency change of course could have been a cause of the collision.

c. The Roustabout was not at fault for failure to keep a proper lookout.

The sole fault of the lookout, if any, was his failure to report the red light of the *Eastern Prince*. Since the captain of the *Roustabout* became aware of that red light at the same time that the lookout did, the failure by the lookout to report that light could not, of course, have been a cause of the collision. Appellant is content to rest upon its opening brief to refute the contention by appellees that this failure by the lookout contributed in any way to the collision of the *Roustabout* and *Eastern Prince*. (Appellant's Opening Brief 52-54),

CONCLUSION

It is respectfully submitted that the decree of the trial court should be reversed.

Respectfully submitted,

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No. 12002

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IDA MAY TALBOT,

Appellant,

vs.

CITY OF PASADENA, a municipal corporation, CHARLES C. HAMILL, A. RAY BENEDICT, A. E. ABERNETHY, MILTON S. BRENNER, JOSEPH A. SPRANKLE, JR., ALBERT I. STEWART and CARL G. WOPSCALL, individually and as members of the Board of Directors of the City of Pasadena, O. A. DIETRICH, individually and as Secretary of the Pasadena Fire and Police Retirement System, and ERNEST F. COOP, CHARLES H. KELLEY and W. E. ANDERSON, individually and as former members of the Fire and Police Pension Board of the City of Pasadena and WILLIAM SCHLOSSBERG,

Appellees.

BRIEF OF APPELLEES.

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No. 12002

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IDA MAY TALBOT,

Appellant,

vs.

CITY OF PASADENA, a municipal corporation, CHARLES C. HAMILL, A. RAY BENEDICT, A. E. ABERNETHY, MILTON S. BRENNER, JOSEPH A. SPRANKLE, JR., ALBERT I. STEWART and CARL G. WOPSCHALL, individually and as members of the Board of Directors of the City of Pasadena, O. A. DIETRICH, individually and as Secretary of the Pasadena Fire and Police Retirement System, and ERNEST F. COOP, CHARLES H. KELLEY and W. E. ANDERSON, individually and as former members of the Fire and Police Pension Board of the City of Pasadena and WILLIAM SCHLOSSBERG,

Appellees.

BRIEF OF APPELLEES.

Preliminary Statement.

This is an appeal from a judgment of the District Court dismissing the complaint for lack of jurisdiction upon motion of appellees. [Tr. p. 34.]

It is alleged in the complaint that Edgar R. Talbot, deceased husband of appellant, was a member of the Fire Department of the City of Pasadena and died as a result of a wetting received in line of duty. Demand was made for the payment of a pension. Appellant and appellees agreed that the case had been tried in the state courts approximately in the year 1934 and that judgment was rendered against appellant. [Tr. p. 32.]

Statement of the Case.

It is alleged in the first cause of action that appellant and appellees, except the City of Pasadena, a municipal corporation, are citizens of the State of California; that the amount involved is in excess of \$3,000.00, exclusive of interest and costs; that the action is brought to recover damages for the infringement of appellant's civil rights and is within the jurisdiction of the District Court as a suit arising under the Constitution and laws of the United States; and that appellant has a vested and continuing equitable right of property in and to a certain trust fund held by appellees under the provisions of the Charter of the City of Pasadena. [Tr. pp. 2-3.]

It is also alleged that the property right and claim of appellant is based upon the fact that her deceased husband died on April 15, 1930, "as a result of a wetting received in line of duty" and that the proof of her said claim and her demands were submitted to appellees from 1930 to and including 1948 and that appellees arbitrarily and without right or justifiable legal execution refused to award her a

pension pursuant to Section XI, Subdivision (F) of the Charter of the City of Pasadena. [Tr. p. 4.]

In paragraph (f) of the first cause of action appears the following quotation from the Charter provision aforesaid:

“Whenever any member of either Department shall lose his life, while in the performance of his duty, or as the direct result of any injury received *inn* the performance of his duty, shall die within one hundred (100) days therefrom, then upon proof of such facts, said board shall order and direct that a yearly pension equal to one-third of the amount of the annual salary attached to the rank or position which he may have held in said department shall be paid in monthly installments in equal portions, to his widow during her life time; provided, that if such widow shall marry or die then the pension paid *to-su* such person, dying or marrying, shall cease.” [Tr. p. 5.]

In paragraph (g) it is alleged that at the time of the death of Edgar R. Talbot his salary as fireman was \$100.00 per month, that within six months after the death of Edgar R. Talbot appellant filed an application for a pension, that appellees failed and refused under color of state law to make payment of said pension, that appellant at various times “each year from 1930 to 1948” appeared before appellees and demanded payment of said pension and each time the appellees without right and without justifiable legal excuse and in an arbitrary and unreasonable manner refused to award appellant the pension to which

she was entitled to appellant's actual damage in the sum of \$14,000.00. Appellant seeks punitive damages in the sum of \$50,000.00. [Tr. pp. 5-7.]

In the second cause of action it is alleged that appellees entered into an unlawful conspiracy to deprive appellant of her vested and continuing equitable right of property in the trust fund held by appellees and that appellees have deprived appellant of her civil rights and have denied her constitutional rights as a citizen of the United States and in so acting have under color of state law, statute, ordinance, custom, regulation and usage subjected appellant to the deprivation of her rights, privileges and immunities secured to her by the Constitution of the United States to her actual damage in the sum of \$14,000.00. Appellant seeks punitive damages in the sum of \$50,000.00. [Tr. pp. 7-9.]

It is alleged in the third cause of action that for the purpose of defeating appellant appellees "produced false and perjured testimony against this plaintiff, with the intent to deprive, and impede plaintiff in the assertion and prosecution of her right of property in said trust fund" and that appellees have deprived appellant of the privileges of due process of law and equal protection of the law secured to citizens of the United States by the Fourteenth Amendment, to the actual damage to appellant in the sum of \$14,000.00. Punitive damages in the sum of \$50,000.00 are also sought. [Tr. pp. 9-10.]

ARGUMENT.

I.

The Complaint Was Properly Dismissed for Lack of Jurisdiction.

The entire argument of appellant and the points raised in appellant's brief pertain to the question of jurisdiction. The argument seems to be that the District Court has jurisdiction because of the allegations in the complaint that it does have jurisdiction, that the action arises under the Constitution and laws of the United States and that appellant has been deprived of her civil rights and has been denied due process of law.

The complaint consists almost entirely of conclusions and does not contain any ultimate facts upon which jurisdiction could be based. No facts are alleged to indicate that a constitutional question is involved or that any civil rights were violated or that there was any denial of due process of law. Although appellant states in her complaint that various rights were violated and seeks general and punitive damages, nevertheless appellant actually seeks by her complaint to secure a pension under the provisions of the Charter of the City of Pasadena as the same existed at the time of her husband's death. Among other things the Charter provided that a pension might be granted to a widow of a member of the Fire Department if such member should lose his life while in the performance of his duty or as the direct result of any injury received in the performance of his duty, provided the death occurred within 100 days from the injury and provided further that such facts are

proved. [Tr. p. 5.] The complaint contains no allegations of such facts. The record before this court shows that the case was tried in the state courts and that judgment was rendered against the appellant. [Tr. p. 32.]

In the case of *Emmons v. Smitt*, 149 F. 2d 869, a motion to dismiss was granted. The judgment of dismissal was affirmed on appeal. The court held that a federal District Court may not proceed with any case coming before it until it has satisfied itself from the plaintiff's statement of his own case that it has jurisdiction to entertain it. The appellate court also held that the federal civil rights statute did not authorize the District Court to entertain an action by an attorney to enjoin the grievance committee from continuing with state bar proceedings against the attorney since the right to practice law was not secured by the Constitution or by any law of the United States and that it was not a property right but a privilege granted by the state. At pages 871 and 872 the court said:

“[5] The contention that plaintiff was denied equal protection of the laws as provided by the Fourteenth Amendment is unwarranted. There is nothing of substance in the complaint that the writ of prohibition was arbitrarily or capriciously issued or with any intention of affecting the rights of plaintiff as distinguished from those of any other citizen who had been or who might be found in the same class or confronted with the same circumstances.”

In the case of *Shanks v. Banting Mfg. Co.*, 9 F. 2d 116, the complaint was dismissed and plaintiff's motion for rehearing was denied. Among other things the court said:

“We are now considering a motion for a rehearing; and we are asked to regard, as the controlling

federal statute, this much of section 24 of the Judicial Code (Comp. St. §991): ‘The District Courts shall have original jurisdiction * * * of all suits * * * where the matter * * * exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States. * * *’ When such a situation is present, diversity of citizenship is not essential to jurisdiction.

“In *Defiance Water Co. v. Defiance*, 191 U. S. 194, 24 S. Ct. 67, 48 L. Ed. 140, the Supreme Court observed: ‘The presumption is in all cases that the state courts will do what the Constitution and laws of the United States require.’ ”

* * * * *

“A summary of the current of authorities seems to be that a suit, to be said to arise under the Constitution or laws of the United States, within the meaning of this part of the section in question, must be one which, seen from the record, really and substantially involves a controversy as to the effect or construction of the Constitution or laws, upon the determination of which the result depends.”

“Where the parties are residents of the same district, it seems that, when the contention can be made that the state agency violated the practice and Code inhibitions of the state in the act alleged to be contrary to both state and federal Constitutions, the aggrieved party is relegated, in the first instance, to his state court, if remedies are available there as comprehensive as in the federal court. Such are the facts here, assuming that the judgment was *coram non judice*. If the instant contention may be said to ‘arise’ under the Constitution of the United States, just as plainly does it ‘arise’ under that of the state, whose Code and prac-

tice offer remedies more opportune than, and just as effective as, any possible in the federal practice.

“It is sound policy, and one encouraged by the flavor of all federal adjudications, not to extend federal jurisdiction over matters equally cognizable by state tribunals unless the elements of that jurisdiction are so clearly present that the principle of comity has no place in the matter.”

In the case of *Trudeau v. Barnes*, 65 F. 2d 563, the judgment of dismissal was affirmed. Among other things the court said:

“This is an appeal from a judgment dismissing on exceptions a petition in an action at law to recover damages for being deprived of the right to register as a voter in the state of Louisiana. The plaintiff is a negro, and the defendant is the registrar of voters for Orleans parish. The petition was brought under 8 USCA §43, which provides that every person who, under color of any statute, ordinance, etc. subjects any citizen to the deprivation of any right, privilege, or immunity secured by the Constitution and laws of the United States, shall be liable to any injured party in an action at law or other proper proceeding. * * * The plaintiff’s allegations to the effect that the registrar acted arbitrarily stated no facts sufficient to show that he was entitled to registration.

* * * * *

“ . . . We cannot say, and refuse to assume, that, if the plaintiff had pursued the administrative remedy that was open to him, he would not have received any relief to which he was entitled. At any rate, before going into court to sue for damages he was bound to exhaust the remedy afforded him by the Louisiana Constitution.”

In the case of *Viles v. Symes*, 129 F. 2d 828, it was held that the Federal Court had no jurisdiction in an action against a Federal District Judge and others for damages for alleged malicious prosecution and false imprisonment. Among other things the court said:

“The petition charges in substance that the defendants named entered into a conspiracy for the sole purpose of securing his indictment and conviction in the United States District Court of Colorado for violation of the Bankruptcy Act, and that such indictment and subsequent conviction, sentence, and imprisonment, were obtained by false testimony and with knowledge on the part of the appellees that the appellant was innocent of any offense whatsoever.

* * * * *

“Beyond the bare allegation that the suit arises under the First, Fifth and Sixth Amendments of the Constitution, and 18 U. S. C. A. §596, it is difficult to understand how, or in what manner, this suit arises under the Constitution or laws of the United States.”

* * * * *

“ . . . It is said, ‘a suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.’ (Citing cases.)

“Clearly, the gravamen of the appellant’s suit is one for malicious prosecution and false imprisonment. The cause of action which he attempts to assert arises from his alleged wrongful trial and conviction in a United States District Court, wherein the parties

against whom he seeks judgment are, the judge of the court, the district attorney and his assistant who prosecuted him, the witness who testified on behalf of the government, and his subsequent imprisonment pursuant to processes issued out of that court under its authority while acting in a judicial capacity. His right to recover has its genesis and is governed by the local law of the forum. True, his right to due process of law and to a speedy, fair and impartial trial, is protected by the Fifth and Sixth Amendments to the Constitution, but these rights as here asserted lurk in the background of his suit, and do not, in these circumstances, confer jurisdiction upon the courts of the United States."

The case of *Love v. Chandler*, 124 F. 2d 785, was one wherein the judgment of dismissal was affirmed. The court's opinion reads in part as follows:

"This appeal is from a judgment dismissing the appellant's complaint in an action for damages, upon the ground that the complaint fails to state a claim upon which relief can be granted. In substance, the claim stated in the complaint is that the appellees, most of whom are officers or agents of either the United States or the State of Minnesota, have engaged in a conspiracy to prevent, and have prevented, the appellant from having and holding employment under the Works Progress Administration, for which employment the appellant, as a citizen of the United States and as a poor person, was eligible and qualified; and that the appellees, in furtherance of their conspiracy, have subjected the appellant to threats, assaults, insanity proceedings and temporary wrongful deprivation of liberty.

"The appellant contends that his complaint states a claim under §47(2) and (3) of Title 8 U. S. C. A.,

authorizing actions for damages for conspiracies to deprive citizens of the equal protection of the laws or from exercising any right or privilege as a citizen of the United States, and that it also states a claim under §48 of Title 8 U. S. C. A., which authorizes the recovery of damages from any person who, having knowledge of such a conspiracy and the power to prevent it, neglects or refuses so to do. The appellant further contends that the trial court had jurisdiction of the subject matter of this action by virtue of §41(12), (13) and (14) of Title 28 U. S. C. A., which confer upon the District Courts of the United States jurisdiction of actions to recover damages for deprivation of rights in furtherance of such conspiracies as are described in §47 of Title 8 U. S. C. A.

“The trial court was of the opinion that, since this Court had held in *Love v. United States*, 108 F. 2d 43, 49, that the right of the appellant to be employed by the Works Progress Administration was not an absolute right conferred by the Constitution or laws of the United States and that the District Court was without jurisdiction to review the administrative action of which the appellant had complained in that case, the complaint in the instant action, under the rule announced in *Mitchell v. Greenough*, 9 Cir., 100 F. 2d 184, certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056, did not state a claim for damages resulting from a conspiracy to deprive the appellant of any right or privilege dependent upon a law of the United States.

“The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action the effect of which would be to abridge the

privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. See *Buchanan v. Warley*, 245 U. S. 60, 78, 38 S. Ct. 16, 62 L. Ed. 149. L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 509-514, 59 S. Ct. 954, 83 L. Ed. 1423; *Hodges v. United States*, 203 U. S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; *Logan v. United States*, 144 U. S. 263, 290, 291, 12 S. Ct. 617, 36 L. Ed. 429. The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (*United States v. Mosley*, 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355), did not have the effect of taking into federal control the protection of private rights against invasion by individuals. *Hodges v. United States*, 203 U. S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; *Logan v. United States*, 144 U. S. 263, 282-293, 12 S. Ct. 617, 36 L. Ed. 429. The protection of such rights and redress for such wrongs was left with the States. (Citing cases.)

“The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. We have already held that he had no absolute right under the laws of the United States to have or retain employment by the Works Progress Administration. The appellant seeks damages because certain persons, as individuals, have allegedly conspired to injure him

and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think within the exclusive province of the State. Compare *Hodges v. United States*, 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65; *Carter v. Greenhow*, 114 U. S. 317, 330, 5 S. Ct. 928, 962, 29 L. Ed. 202, 207. We agree with the trial court that the appellant has failed to state a claim upon which relief could be granted under the statutes which he has invoked. His complaint was properly dismissed."

In the case of *Snowden v. Hughes*, 321 U. S. 1, 88 L. Ed. 497, the court affirmed the judgment of dismissal for failure of the complaint to state a cause of action within the jurisdiction of the District Court. The suit was brought to recover damages for an asserted illegal refusal to certify that plaintiff had been nominated as a candidate for representative in the General Assembly of Illinois.

The cases cited by appellant are not in point. They involve racial discrimination or the deprivation of rights secured by the federal Constitution and laws. For example, the case of *Alston v. School Board*, 112 F. 2d 992, had to do with the fixing of salaries of negro teachers in public schools at a lower rate than that paid to white teachers of equal qualifications and experience and performing the same duties on the sole basis of race and color.

The case of *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 83 L. Ed. 1423, cited by appellant, was concerned with the rights of freedom of speech and of peaceable assembly.

Appellant cites the case of *American Federation of Labor v. Watson*, 327 U. S. 582, 90 L. Ed. 873. In that case the court held that the Federal Court had jurisdiction since a law regulating commerce was involved.

Another case cited by appellant is that of *Bell v. Hood*, 327 U. S. 678, 90 L. Ed. 939, wherein the court held that the District Court had jurisdiction since there was involved the protection from unreasonable searches and the deprivation of liberty without due process of law.

It was held in the case of *Tunstall v. Brotherhood, Etc.*, 323 U. S. 210, 88 L. Ed. 187, cited by appellant, that the Federal Court had jurisdiction inasmuch as a federal statute regulating commerce was involved.

II.

The Cause of Action Attempted to Be Stated Is Barred by the Statute of Limitations.

The trial court could have dismissed the complaint on the ground that the Statute of Limitations had run against the alleged claim or cause of action. The Circuit Court of Appeals has the right to affirm the judgment for a reason other than that specified by the lower court. As stated in the case of *Commissioner of Internal Revenue v. Bryson*, 79 F. 2d 397, at page 402:

“It is well settled that an appellate tribunal may affirm a case on grounds other than those which prompted the judgment below.”

According to the complaint, the appellant's husband died on April 15, 1930. [Tr. p. 4.] Appellant filed her complaint in the District Court on May 14, 1948. [Tr. p. 12.] Thus a period of more than 18 years has elapsed

from the date of decedent's death to the filing of the complaint in the District Court.

Section 338(1) of the Code of Civil Procedure of the State of California provides that an action upon a liability created by statute other than a penalty or a forfeiture must be commenced within three years.

In the case of *Jones-Burget v. Burrough of Dorment*, 14 F. 2d 954, the complaint was dismissed by the trial court on the ground that plaintiff's statement of claim failed to set forth any cause of action entitling her to recover. The judgment of dismissal was affirmed by the Circuit Court of Appeals. The action was for false arrest and imprisonment and was commenced after the expiration of two years subsequent to the imprisonment. The Pennsylvania Statute of Limitations was two years.

In the case of *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. 2d 742, the court said at pages 750 and 751:

"In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy, but upon the injuries resulting therefrom. The fact that there may be a criminal conspiracy does not give a plaintiff an action for damages under section 7 of the Anti-Trust Law, 15 U. S. C. A. §15 note, *supra*. *Glenn Coal Co. v. Dickinson Fuel Co.* (C. C. A.) 72 F. (2d) 885; *Strout v. United Shoe Machinery Co.* (D. C.) 208 F. 646, 651. The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. *Morris & Co. v. Nat'l Ass'n of Stationers* (C. C. A.) 40 F. (2d) 620. The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time."

In the case of *Curtis v. Connly*, 257 U. S. 260, 66 L. Ed. 222, the complaint was dismissed by the District Court on the ground that the Statute of Limitations of the State of Rhode Island was a bar to the action. The decree was affirmed by the Circuit Court of Appeals, 264 Fed. 650. The Supreme Court affirmed said decree. Among other things the court said:

“There is no dispute that the Statute of Rhode Island governs the case.”

In the case of *O’Sullivan v. Felix*, 233 U. S. 318, 58 L. Ed. 980, the judgment dismissing an action for an assault committed in attempting to prevent plaintiff from voting was affirmed on the ground that the one year Statute of Limitations of the State of Louisiana had run against the action. Among other things the court said:

“That the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the state is established beyond controversy by cases cited by the circuit court and by *McClaine v. Rankin*, 197 U. S. 158, 49 L. Ed. 702, 25 Sup. Ct. Rep. 410, 3 Ann. Cas. 500.

“It is therefore not necessary to pursue in detail the argument of plaintiff based on the postulate that ‘the Sovereign alone can limit the right of action,’ and that because injury was inflicted on him in the course of violating Federal laws the limitation of the state could not apply. Congress, of course, could have, by specific provision, prescribed a limitation, but no specific provision is adduced. The limitation

of five years is asserted on the ground that the action is for a penalty, and that it is such is deduced from the provisions of title 24 of the Revised Statutes. (U. S. Comp. Stat. 1901, p. 1259), securing equal civil rights to all citizens.”

In the case of *Keen v. Mid-Continent Petroleum Corp.* (1945), 58 Fed. Supp. 915, the court held that the Iowa Statute of Limitations applied in an action for recovery of overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938, 29 U. S. C. A., Sec. 201, *et seq.* At pages 917 and 918 the court said:

“The parties do not seem to be in dispute but what it is the general rule that where a Federal statute provides for a right and Congress has not prescribed any period of limitation, that the valid applicable state statutes of limitations are to be applied.”

* * * * *

“It should be noted that there are a number of rights given under Federal statutes where Congress did not prescribe any period of limitation and which are governed by the applicable state statutes of limitations. * * *

“(2) Actions for deprivation of civil rights or for conspiracy to deprive persons of civil rights. 8 U. S. C. A. §§43, 47, see *O’Sullivan v. Felix*, 1914, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; *Mitchell v. Greenough*, 9 Cir., 1938, 100 F. 2d 184, certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056.”

Conclusion.

It is submitted that the complaint demonstrates on its face:

1. That the District Court does not have jurisdiction over the subject matter referred to in the complaint.
2. That the applicable three year Statute of Limitations of the State of California has run against the alleged cause or causes of action.

It is therefore respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

H. BURTON NOBLE,
City Attorney,

FRANK L. KOSTLAN,
Assistant City Attorney,
Attorneys for Appellees.

No. 12003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD, Individually and as Executor
of the Estate of Elaine Shipp, Deceased,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

OCT 13 1948

PAUL P. O'BRIEN,

CLERK

No. 12003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD and ELAINE SHIPP,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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727 West Seventh Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States
Southern District of California

Central Division

No. 8130-WM

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Plaintiff,

vs.

ELLSWORTH WOOD, ELAINE SHIPP, JOHN DOE
and RICHARD ROE,

Defendants.

COMPLAINT CLAIM AND DELIVERY

(California Code of Civil Procedure, Sections 509 to 521)

Comes now the plaintiff and for cause of action against
the defendants, and each of them, alleges as follows:

I.

That the plaintiff at the times hereinafter mentioned
was, and now is, a foreign corporation, organized and
existing under and by virtue of the laws of the State of
Delaware and doing business in the State of California.

II.

That the defendants are residents of the County of
Los Angeles, State of California.

III.

Jurisdiction in this case is founded upon diversity of
citizenship and the amount in controversy. Plaintiff is

a citizen of the State of Delaware and the defendants are citizens of the [2] State of California. The matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

IV.

That the defendants, John Doe and Richard Roe, are fictitious persons whose true names are unknown to plaintiff and plaintiff asks leave that when said true names be ascertained the complaint be amended to show the said true names.

V.

That plaintiff is the owner of the following described personal property, to wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, California State License Number 8S2223,

and is entitled to the possession of said automobile.

VI.

That the hereinabove described personal property is of the value of Four Thousand Dollars (\$4,000.00).

VII.

That plaintiff has demanded possession of the hereinabove described personal property, that the defendants have failed and refused to surrender possession to plaintiff.

VIII.

That the defendants, Ellsworth Wood, Elaine Shipp, John Doe and Richard Roe, do now unlawfully hold and

detain from the possession of the plaintiff the herein described personal property, to wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, California State License Number 8S2223,

all of which is to the damage of plaintiff in the sum of Four Thousand Dollars (\$4,000.00), the value of the said personal property. [3]

Wherefore, plaintiff demands judgment against defendants for the recovery of possession of the herein described personal property or for the sum of Four Thousand Dollars (\$4,000.00), the value thereof, in case delivery cannot be had; for the costs of suit herein expended and such other and further relief as may be proper.

MACFARLANE, SCHAEFER & HAUN

By Dexter D. Jones

Attorneys for Plaintiff [4]

[Verified.]

[Endorsed]: Filed Apr. 14, 1948. Edmund L. Smith, Clerk. [5]

[Title of District Court and Cause]

ANSWER

Comes now Ellsworth Wood, one of the defendants above named, and answering the complaint on file herein admits, denies, and alleges as follows, to-wit:

I.

Defendant admits the allegations contained in Paragraphs II, III, VI and VII of the complaint on file herein.

II.

Defendant denies each and every, all and singular, specifically and particularly, each allegation, matter or thing alleged in Paragraphs I, V and VIII of the complaint on file here.

As a Further and Separate Answer to the Complaint on File Herein Said Defendant Alleges as Follows, to-wit: [6]

I.

That said defendant, Ellsworth Wood, is the owner of the following personal property, to-wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, California State License Number 8S2223,

and was at all times mentioned in the complaint and now is entitled to the possession of said automobile.

II.

That Everett S. Shipp, the husband of defendant Elaine Shipp, gave the automobile described in Paragraph I of

defendant's affirmative answer herein, to said Elaine Shipp in March 1947. That at said Everett S. Shipp's request and for tax purposes said defendant Elaine Shipp, consented to have the certificate of ownership and the certificate of registration issued in the name of the plaintiff herein, The Metropolitan Finance Corporation of California, a corporation.

III.

That on April 4, 1948, defendant, Elaine Shipp, gave said automobile to defendant, Ellsworth Wood; that said Elaine Shipp reserved, for the remaining days of her life, to herself, at the time of making that gift, the use of said automobile; that ever since April 4, 1948, defendant, Ellsworth Wood, has been and now is the owner of said automobile.

Wherefore defendant, Ellsworth Wood, prays that the plaintiff above named take nothing by its action herein and that said defendant Ellsworth Wood, be given judgment for the return of possession of the said automobile, or for the sum of \$4000.00 the value thereof, in case delivery cannot be had. For costs of suit herein expended and for such other and further relief as may be proper.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendant Ellsworth Wood [7]

[Verified.] [8]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 4, 1948. Edmund L. Smith, Clerk. [9]

[Title of District Court and Cause]

ANSWER

Comes now Elaine Shipp, one of the defendants above named, and answering the complaint on file herein admits, denies and alleges as follows, to-wit:

I.

Defendant admits the allegations contained in Paragraphs II, III, VI and VII of the complaint on file herein.

II.

Defendant denies each and every, all and singular, specifically and particularly, each allegation, matter or thing alleged in Paragraphs I, V and VIII of the complaint on file herein.

As a Further and Separate Answer to the Complaint on File Herein Said Defendant Alleges as Follows, to-wit: [10]

I.

That said defendant, Elaine Shipp, is the owner of the following personal property, to-wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, California State License Number 8S2223,

and was at all times mentioned in the complaint and now is entitled to the possession of said automobile.

II.

That Everett S. Shipp, the husband of said Elaine Shipp, gave the automobile described in Paragraph I of defendant's affirmative answer herein, to said Elaine Shipp in March 1947. That at said Everett S. Shipp's

request and for tax purposes said defendant, Elaine Shipp, consented to have the certificate of ownership and the certificate of registration issued in the name of the plaintiff herein, The Metropolitan Finance Corporation of California, a corporation.

III.

That said Everett S. Shipp owns at least 85% of the stock of the Metropolitan Finance Corporation of California, a corporation.

That at all times since the purchase of the automobile described in Paragraph I of the affirmative answer herein the defendant, Elaine Shipp, has been in possession and control of said automobile; that at all of such times said defendant, Elaine Shipp, has been the owner of said automobile and no one has used said automobile except said defendant without said defendant's permission.

That on or about April 15, 1948, the plaintiff above named through the Office of the United States Marshal unlawfully seized said automobile and now unlawfully is holding and detaining from the said defendant, Elaine Shipp, the said automobile, to-wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, [11] California State License Number 8S2223,

all of which is to the damage of said defendant, Elaine Shipp, in the sum of \$4000.00 the value of said automobile.

Wherefore defendant, Elaine Shipp, prays that the plaintiff above named take nothing by its action herein and that said defendant, Elaine Shipp, be given judgment for the return of possession of the said automobile, or for the sum of \$4000.00 the value thereof, in case delivery

cannot be had. For costs of suit herein expended and for such other and further relief as may be proper.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendant Elaine Shipp [12]

[Verified.] [13]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 4, 1948. Edmund L. Smith, Clerk. [14]

[Title of District Court and Cause]

NOTICE OF MOTION TO REMAND OR DISMISS
ACTION

To: Messrs. Macfarlane, Schaefer and Haun and Dexter D. Jones, Attorneys for Plaintiff, above named.

Please take notice that on June 7, 1948, at 10:00 A. M., or as soon thereafter as counsel may be heard, at the United States Court House at Los Angeles, California, and in Court Room No. 2, of the above entitled court, I shall apply for an order remanding the above entitled cause to the Superior Court in and for the County of Los Angeles, State of California, or to dismiss said action.

I herewith serve upon you a copy of the motion which will be presented to the court at the time aforesaid.

WATERS, ARDITTO AND WATERS

By James J. Arditto

May 17, 1948. [15]

MOTION TO REMAND CAUSE TO SUPERIOR
COURT IN AND FOR THE COUNTY OF LOS
ANGELES, STATE OF CALIFORNIA, OR TO
DISMISS CAUSE

Defendants, Ellsworth Wood and Elaine Shipp, move to remand the above entitled cause to the Superior Court in and for the County of Los Angeles, State of California, or to dismiss the action on the ground that this court is without jurisdiction to hear and determine the cause.

This court is without jurisdiction in the following respects:

On March 8, 1948, Elaine Shipp filed her answer and cross-complaint in action number D 356410 pending in the Superior Court in and for the County of Los Angeles, State of California, wherein she alleged inter alia (paragraph IV of Cross-Complaint), that the Cadillac automobile (the replevin of which is sought herein) was the community property of Everett S. Shipp and Elaine Shipp, husband and wife. [16]

On March 9, 1948, Honorable Orlando H. Rhodes, Judge of said Superior Court, issued an order which, inter alia, restrained and enjoined Mr. Shipp from "interfering with Mrs. Shipp's use of a 1947 Cadillac."

An action to recover possession of an automobile and an action to determine interests of husband and wife in specific property are actions in rem. In the above entitled action, and in the said Superior Court action the essential and only issue (relative to the automobile) is that relating to title to a "thing", to-wit: an automobile. In both of said actions the parties are, in effect, asking for a quiet title decree.

The fact that Metropolitan Finance Corporation of California, an alleged corporation, is plaintiff herein is

immaterial to the issue at hand when it is pointed out that said alleged corporation is owned and controlled by Mr. Shipp and is a mere fiction under which Mr. Shipp does business.

In any event the issues in said action are identical and the action in the Superior Court in and for the County of Los Angeles, State of California, was commenced at least thirty-six (36) days before the above entitled action.

Attached hereto, as Exhibit A, in a Memorandum in support of this motion.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendants

Dated: May 17, 1948. [17]

EXHIBIT A

MEMORANDUM IN SUPPORT OF MOTION TO REMAND OR TO DISMISS

As between the Federal and State Courts, the one which first acquires jurisdiction by actual or constructive possession of property is vested with power to hear and determine all controversies in respect thereof.

Princess Lida v. Thompson, 305 U. S. 456, 59 S. Ct. 275.

Penn. General Casualty Co. v. Pennsylvania, 294 U. S. 189, 55 S. Ct. 386.

United States v. Bank of New York, etc. Co., 296 U. S. 463, 56 S. Ct. 343.

Boston Acme Mines Corp. v. Salina Canyon Coal Co., 3 Fed. (2nd) 729, 733. [18]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 21, 1948. Edmund L. Smith, Clerk. [19]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION TO
DISMISS OR REMAND

State of California

County of Los Angeles—ss.

James J. Arditto, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the defendants above named and that the following set forth herein is within his own personal knowledge.

That on the 4th day of March, 1948, Everett S. Shipp filed a complaint for divorce against Elaine Shipp in the Superior Court in and for the County of Los Angeles, State of California; that said action was numbered D 356410 by the County Clerk of said county; that a true and correct copy of said complaint is attached hereto as Exhibit A. [20]

That on the 8th day of March, 1948, Elaine Shipp filed an answer and cross-complaint in the said action in said Superior Court; that a true and correct copy of said answer and cross-complaint is attached hereto as Exhibit B.

That on the 9th day of March, 1948, the Honorable Orlando H. Rhodes, judge of said Superior Court signed an order restraining Mr. Shipp from, inter alia, "interfering with Mrs. Shipp's use of a 1947 Cadillac", a true and correct copy of said order is attached hereto as Exhibit C.

That on the 19th day of April, 1948, the Honorable Joseph W. Vickers, Judge of said Superior Court, directed the entry of an order providing, inter alia, that Mr.

Shipp be enjoined from interfering with Mrs. Shipp's use and enjoyment of the Cadillac automobile providing she should legally recover possession of same. This restraint was incorporated in Paragraph (12) (c) of a formal order which was signed by said Judge Vickers on May 14, 1948, a copy of said formal order is attached hereto as Exhibit D.

That the order of the Honorable Orlando H. Rhodes, Judge of said Superior Court, was in full force and effect at all times on and after March 9, 1948, to and including the 19th day of April, 1948, through the hour of about 3:30 P. M. Said order of March 9th, 1948, was then superseded by the order of May 14, 1948, which is attached hereto as Exhibit D.

That said order of March 9, 1948, was personally served on Everett S. Shipp on or about the 9th day of March, 1948; that said order of March 9, 1948, was in full force and effect on April 14th, 1948, the day the above entitled action was commenced in this court.

That defendants and cross-complainants' Exhibit B which is attached to the deposition of Everett S. Shipp which was commenced on May 5, 1948, discloses that Everett S. Shipp owns at least 76% of the stock of the plaintiff above named. A copy of said Exhibit [21] B is attached hereto as Exhibit E.

That the transcript of said deposition of Mr. Shipp discloses, at page 222, line 15, to page 224, line 15, that the following questions were asked of Mr. Shipp and Mr. Shipp gave the following answers:

"Q. Now, I notice in the minutes of the Metropolitan Finance Corporation of California of April 8, 1948, where the Cadillac came up again, and au-

thorization was given to go ahead and sue to replevin that automobile.

Who prepared those minutes?

A. Mr. Crooks.

Q. Do you know whether he made any notes of that meeting, or prepared the notes, or rather the minutes, from memory?

A. I don't know of that at all. I left the meeting. I was present at the beginning and advised them what was happening to their property, and that I was—that I had sued, and had been sued, excused myself from the meeting and left.

Q. Was that a regular meeting of the board of directors?

A. No, it wasn't.

Q. Who called the meeting together?

A. I notified Mr. Crooks to notify them two days in advance as required by the by-laws.

Q. Where was the meeting held?

A. Here at this office.

Q. Who was present other than the people noted in the minutes?

A. Other than the people noted in the minutes and Mr. Crooks—he is not a director—just the three directors, and I left the meeting, and left Mr. Crooks and the two directors present.

Q. Did you discuss taking that action with anybody?

A. No.

Q. You just decided it yourself?

A. What is that? [22]

Q. You just decided yourself to call the meeting; is that right?

Mr. Haley: Now, just a minute. As I understand it, there is an action pending in the Federal Court involving the ownership and title to this automobile. It certainly is not in this litigation.

Mr. Arditto: This Cadillac is certainly in this litigation.

Mr. Haley: And it is now an attempt to bring it in a deposition with the case pending in the Federal Court between the corporation and your client. It is not material to the present situation.

Mr. Arditto: The record will show that the Cadillac automobile is in the jurisdiction of the Superior Court of the State of California.

Mr. Haley: You can argue that matter before the Federal Court, because I am not going to argue it here in the absence of a court hearing.

Mr. Arditto: I am going to argue it both before the Federal Court and before this Court.

Mr. Haley: You can't argue it here. It is at issue in the Federal Court."

That one of the issues involved in the said action in said Superior Court, which was commenced at least thirty-three days before the above entitled action was commenced is whether the Cadillac automobile, which is the subject matter of this action, is the separate property of Mrs. Shipp or the separate property of Mr. Shipp, or the community property of Mr. and Mrs. Shipp or the property of the above named plaintiff.

That at all times since the purchase of said Cadillac automobile in March 1947, up to and including the 14th day of April, 1948, the Cadillac automobile, which is the subject matter of this action, was in the possession and control of Elaine Shipp, one of the [23] defendants above named. That on April 8, 1948, Everett S. Shipp, who is the owner of at least 75% of the stock of the above named alleged corporation (also the director and the president and the general manager of said alleged corporation) did, as disclosed by the minutes of said alleged corporation of April 8, 1948, call the alleged directors of said alleged corporation to a special meeting for the purpose of starting the above entitled action; that all of said transactions occurred at the time that the restraining order of March 9, 1948, hereinbefore referred to, was in full force and effect.

That your affiant has information and believes and therefore alleges upon such information and belief that the commencement of the above entitled action was a subterfuge conceived of by Mr. Shipp as a means of circumventing the restraining order of said Orlando H. Rhodes and the jurisdiction of said Superior Court.

JAMES J. ARDITTO

Subscribed and sworn to before me this 24th day of May, 1948.

(Seal)

HELEN G. KAUFMAN

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires Sept. 2nd, 1951. [24]

“EXHIBIT A”

J. Edward Haley
453 South Spring Street
Los Angeles, California
Michigan 1997
Attorney for Plaintiff

In the Superior Court of the State of California, in
and for the County of Los Angeles.

Everett S. Shipp, Plaintiff vs. Elaine Shipp, Defendant.
No.

COMPLAINT FOR DIVORCE
(Extreme Cruelty)

Plaintiff complains of defendant and alleges:

I.

That at all times herein mentioned, plaintiff and defendant have been and are now husband and wife.

II.

That for more than one year last past, plaintiff has been and is now a bona fide resident of the County of Los Angeles, State of California.

III.

For statistical purposes required by Section 426a of the Code of Civil Procedure of the State of California, plaintiff alleges:

1. Plaintiff and defendant intermarried at Las Vegas, Nevada;
2. The date of marriage was on or about April 22, 1940; [25]
3. The date of separation was March 2, 1948;

4. The time that has elapsed from the date of marriage to the date of separation was seven years, ten months and eleven days;

5. That there have been no children born of said marriage.

IV.

That there is no community property belonging to the parties.

V.

Repeatedly and on many occasions during the marriage of the parties, and particularly during the past year, defendant has been guilty of extreme acts of mental cruelty. That each and all of said acts have caused plaintiff to suffer mental pain and suffering, all of which makes it impossible to continue the marriage relation.

VI.

At the present time the parties are residing at 641 Toyopa Drive, Pacific Palisades, California. That this is a home owned by Metropolitan Finance Corporation of California, and all of the furniture and furnishing are the separate property of plaintiff, except for a few personal effects which defendant has received as gifts from this plaintiff. That defendant owns a home of her own located at 1144 Kagawa Avenue, Pacific Palisades, California, which home is fully furnished and which would be adequate for the defendant to move to.

VII.

That by reason of the acts of defendant, plaintiff requests that an order be made by this court ordering the

defendant to move and vacate the home where the parties are now living.

VIII.

That by reason of the various physical threats which defendant has made toward plaintiff, defendant should be restrained and enjoined from interfering or in any manner in molesting [26] defendant or his property.

Wherefore, plaintiff prays:

(a) That he be granted an interlocutory decree of divorce, and that when one year has expired after the entry of said interlocutory decree of divorce a final judgment of divorce be entered;

(b) That he be granted an order by the court, in which said order defendant shall be required to move from the home now occupied by the parties, and that pending the final determination of this action that an order to show cause be issued, and upon hearing thereof that such order be made requiring the removal of said defendant from the home of the parties;

(c) That upon the termination of this action, defendant be restrained and enjoined from interfering with, or molesting plaintiff or from taking any of the personal property owned by this plaintiff;

(d) For such other and further relief as to the court seems just.

(Signed) J. EDWARD HALEY

Attorney for Plaintiff [27]

“EXHIBIT B”

Waters, Arditto and Waters
621 Roosevelt Bldg.
727 West 7th Street
Los Angeles 14, California
Attorneys for Defendant and Cross-Complainant

In the Superior Court of the State of California in and for the County of Los Angeles.

Everett S. Shipp, Plaintiff and Cross-Defendant, vs. Elaine Shipp, Defendant and Cross-Complainant. No. D 356,410.

ANSWER AND CROSS-COMPLAINT

Now Comes Defendant and answering the complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II and II of the complaint.

II.

Denies the allegations contained in paragraphs IV of the complaint.

III.

Denies generally, specifically and positively each, all and every allegation, matter and thing contained in paragraph V of the complaint.

IV.

Denies generally, specifically and positively, each, all and every allegation, matter and thing contained in paragraph VI of the complaint, except that defendant admits that she is residing at 641 Toyopa Drive, Pacific Palisades, California. [28]

V.

Denies that she has committed, performed or engaged in any acts which would induce or justify the Court to order the defendant to move and vacate 641 Toyopa Drive as alleged in paragraph VII of the complaint.

VI.

Denies that she, a woman of ninety pounds, has made any physical or any other kind of threats toward defendant, a man of two hundred pounds, all as alleged in paragraph VIII of the complaint.

And for a Cross-Complaint for Separate Maintenance

Further answering plaintiff's complaint herein and by way of cross-complaint, defendant alleges as follows:

I.

That cross-complainant, Elaine Shipp, and cross-defendant, Everett S. Shipp, were married on or about April 22, 1940, in Las Vegas, Nevada.

II.

That on March 2, 1948, cross-defendant wilfully deserted cross-complainant, and now refuses to properly support said cross-complainant without any cause on the part of cross-complainant. That on March 2, 1948, the parties separated as man and wife.

III.

That cross-complainant is now and for a year past has been a resident of the County of Los Angeles, State of California.

IV.

That the following property was acquired after said parties had intermarried and said property was acquired with community funds and is community property;

- (1) All of the shares of stock in the following corporations:
 - (a) Metropolitan Finance Corporation,
 - (b) Metropolitan Finance Corporation of California
 - (c) Investors Realty Corporation, [29]
 - (d) Chesley Finance Corporation,
 - (e) Summit Realty Corporation,
 - (f) Summit Investors Corporation.
- (a) The following automobiles:
 - (a) 1947 Cadillac Sedan, 62,
 - (b) 1948 Dodge Sedan,
 - (c) 1948 Mercury,
 - (d) 1942 Oldsmobile Sedan,
 - (e) 1948 Dodge Truck.
- (3) Bank deposits in the following banks:
 - (a) California National Bank, Santa Monica,
 - (b) Citizens National Bank, Los Angeles;
 - (c) Security First National Bank, Los Angeles,
 - (d) Bank of America, Los Angeles.
- (4) Home and furnishings at 641 Toyopa Drive, Pacific Palisades, California.
- (5) A number of Insurance and Annuity Policies, the number of and cash surrender value of being unknown to cross-complainant.
- (6) Stocks, bonds and money in safe deposit boxes in the banks mentioned in sub-paragraph (1) of this paragraph.
- (7) Club memberships in the following clubs:
 - (a) Los Angeles Country Club,
 - (b) Los Angeles Athletic Club,
 - (c) Del Mar Country Club.

- (8) An amount of jewelry which is not known to cross-complainant.
- (9) About 400 houses already built or in the process of being completed.

V.

That since the marriage of said cross-complainant and cross-defendant, the said cross-defendant, in utter disregard of his marriage vows, duties and obligations to cross-complainant herein, has been guilty of extreme cruelty toward cross-complainant and has treated [30] cross-complainant in a cruel and inhuman manner and has wrongfully and, without cause, inflicted upon cross-complainant grievous mental and physical suffering as more particularly charged, alleges and set forth as follows:

(a) That on divers and many occasions, the cross-defendant has struck cross-complainant with his hands and thereby inflicted physical injury upon plaintiff herein;

(b) That in the presence of servants, the cross-defendant has on divers and many occasions struck the cross-complainant with his hands and thereby inflicted upon the cross-complainant great physical injury and thereby embarrassed and humiliated cross-complainant before said servants;

(c) That in the presence of mutual friends of the parties hereto and in the presence of servants, the cross-complainant has, without cause, on many and divers occasions, engaged in unwarranted and irritating repetitious arguments with cross-complainant while the latter was very seriously ill and the cross-defendant was under the influence of intoxicating liquors and thereby embarrassed and humiliated cross-complainant before said friends and servants;

(d) That cross-defendant, knowing that cross-complainant was seriously ill and had undergone three (3) major operations within the past year attempted to aggravate her illness and delay her recovery by saying, on divers and many occasions, the following:

- (I) "You poor, miserable creature."
- (II) "You have cancer and you cannot recover."
- (III) "You haven't a chance to get well."
- (IV) "If I had my way I would give you an overdose."
- (V) "I cannot afford to pay all these medical bills."

(e) That cross-defendant on divers and many occasions drank to excess and upon becoming drunk would torment and irritate [31] cross-complainant, although he was well aware of her serious physical condition;

(f) That cross-defendant intentionally and continuously was slamming doors to upset cross-complainant and thus delay or prevent her recovery from said illness;

(g) That cross-defendant on divers and many occasions and while under the influence of intoxicating liquors would, in the presence of mutual friends and the servants, unnecessarily and without cause, complain of the cost of cross-complainant's medical bills and the cost of running the household, and thereby embarrassed and humiliated cross-complainant before said friends and servants.

(h) That cross-defendant has, on divers and many occasions, refused to take cross complainant on boat trips and other week-end trips he was planning to take and which he took.

VI.

That the above and foregoing acts of cruelty are only a few of the acts wilfully and wrongfully inflicted by

the cross-defendant upon cross-complainant and as a result therefrom cross-defendant has suffered great and grievous mental and physical cruelty, embarrassment and deep humiliation, and it has made the marital relation with cross-defendant no longer tolerable.

VII.

That said acts have been done without the connivance and collusion of this cross-complainant.

Wherefore, defendant and cross-complainant prays judgment of the above named court as follows:

(a) That plaintiff and cross-defendant take nothing by his action herein;

(b) That defendant and cross-complainant may live separate and apart from the *defendant*;

(c) That plaintiff and cross-defendant be ordered to pay to [32] defendant and cross-complainant a reasonable sum for her support and maintenance both during the pendency of this action and permanently thereafter;

(d) That plaintiff and cross-defendant be ordered to pay defendant's and cross-complainant's reasonable attorneys fees and court costs, including cost of determining community interest;

(e) That plaintiff and cross-defendant be enjoined and restrained from selling, transferring, hypothecating or in any manner encumbering or disposing of the property listed and referred to in paragraph IV of this cross-complaint;

(f) That plaintiff and cross-defendant be enjoined and restrained from molesting or interfering with the defendant and cross-complainant;

(g) That defendant and cross-complainant be given all the community property of the parties hereto;

(h) For such other and further relief as to this court may appear meet and proper in the premises.

WATERS, ARDITTO AND WATERS

By: (signed) JAMES J. ARDITTO

James J. Arditto

Attorneys for Defendant and Cross-Complainant [33]

“EXHIBIT C”

Waters, Arditto and Waters,
621 Roosevelt Building
Attorneys for Defendant

Address

Telephone: Madison 65133

In the Superior Court of the State of California in and for the County of Los Angeles.

Everett S. Shipp, Plaintiff, vs. Elaine Shipp, Defendant. No. D 356,410.

Order to Show Cause and Affidavit in re Attorney's Fees, Court Costs, Alimony Pendente Lite, Allowance for Support and/or Custody of Children and Restraining Order.

(Strike out inappropriate portions.)

To the above named Plaintiff, Everett Shipp:

(1) You are hereby ordered to appear before the above-entitled court in Department 8 thereof on the 17th day of March, 1948, at the hour of 1:45 P. M., then and there to show cause, if any you have, why:

(a) You should not be required to pay the adverse party above named reasonable sums for attorney's fees, court costs, and for the support and maintenance of said adverse party and the minor children during the pendency of this action.

(b) The custody of the minor children of the parties above-named should not, during the pendency of this action, be awarded as follows: none.

(c) Pending the trial of this action you should not be, and pending the hearing on this Order, you are enjoined and restrained from: opening and withdrawing any money, stock, bond or other thing of value from safety deposit boxes in your name or in which you have an interest through stock ownership, withdrawing any money deposited in the California Bank at 1401 3rd Street, Santa Monica, Citizens National Bank or any of its branches, Bank of America, or any of its branches, Security National Bank, or any of its branches in your name, the plaintiff's name or in the name of the Metropolitan Finance Corporation, Metropolitan Finance Corporation of California, Chesley Finance Corporation, Investor's Realty Corporation, Summit Realty Corporation or in which any of you or said corporation have an interest. Selling, hypothecating, transferring or conveying any personal or real property in which plaintiff or defendant has a community property interest regardless of the name in which such property may be held except in the usual course of business or for the necessities of life.

Molesting or interfering with the defendant and her use and occupancy of the home at 641 Toyopa Drive and her use of a 1947 Cadillac.

Points and Authorities must be placed on the back of this affidavit if a restraining order is sought.

(2) It appearing that the convenience of the court and the prompt and efficient disposition of the business thereof require the same, it is further ordered that you serve upon the adverse party and file with this court, at least two days prior to the date of hearing above specified, an affidavit in substantially the form of that hereunto attached, giving the information therein called for.

(3) This order shall be served by personally delivering a copy thereof attached to a copy of the affidavit upon which it is based, together with a copy of the Form denominated "Husband's Questionnaire," to the party af-

3

fectured at least ~~five~~ days prior to the date of hearing.

Dated March 9, 1948,

ORLANDO H. RHODES

Judge of the Superior Court

Affidavit on Reverse Side [34]

WIFE'S QUESTIONNAIRE

Attorneys representing the wife in Domestic Relations cases are requested to use this form in every such case involving attorney's fees, court costs, alimony pendente lite, a temporary restraining order, allowance for support and/or for custody of children; it will itself constitute the affidavit for, (or in opposition to) the order to show cause.

Affidavit for Order to Show Cause in re
attorneys fees, court costs, alimony Pendente Lite and
restraining order

State of California,
County of Los Angeles—ss.

Elaine Shipp, being first duly sworn, deposes and says:
That she is the Defendant in the above-entitled action

and that she has read the following questions and makes the following answers and statements of fact as material evidence in this case.

1. Date of Marriage: 4/22/40 of separation: 3/2/48
2. What is your age? 42 Husband's age? 55
- 3A. Have you any organic disease or major physical defect, and if so, what? Yes Serious intestinal disorder. Have had three major operations in past year.
- 3B. Has your husband any organic disease or major physical defect, and if so, what? Not known
- 4A. What are your necessary Monthly expenses?

Carrying charge	
Rent	100.00
Food	200.00
Clothes	300.00
Transportation	100.00
Doctor & Dentist	400.00
Laundry	50.00
Utilities	50.00
Insurance	100.00
Incidentals	300.00
Total	1500.00

- 4B. Your Husband's? not known
- 5A. What is the present net financial worth of yourself? \$500 and community property interest
- 5B. Of your husband? \$2,000,000.00 including community property
- 6A. What is your present total monthly income from all sources? none

- 6B. Of your husband? \$5000 per month at least (information and belief)
- 7A. What was the net income last year from all sources (specify sources)
of yourself none except community property income which defendant is ignorant of
- 7B. of your husband? *no* known
8. Have you ever been employed? No State the dates, occupations, and salaries received.....
9. Do you expect to work in the future? *no* At what occupation? illness prevents my working
Commencing when?.....
10. Have you personally arranged to pay your attorney's fees in this case? *no* how much, if anything, have you paid? *none* Court costs? *none*
11. State number, names and ages of minor children of yourself and husband: *none*
12. Custody of children at present is as follows: *none*
13. I request that an order be made fixing their custody as follows:.....
14. Where and with whom do you reside? 641 Toyopa Drive, Pacific Palisades
15. Where do you intend to house children and with whom? Describe accommodations:.....
..... [35]
16. Here state additional material facts, if any: (If Restraining Order is sought state here the facts you claim justify it, etc.) Plaintiff has threatened to:
(1) molest defendant
(2) Sell or otherwise convey property held in his name and the name of the corporations or

businesses listed in the Order herein. Withdraw bank deposits, etc.

- (3) Sell 1947 Cadillac the title to which is normally carried in the names of the Metropolitan Finance Corporation of California which is merely a dummy corporation (like the others) for Mr. Shipp who owns all the stock and/or interest therein.

17. Based upon the foregoing facts I declare that the following sums are reasonably necessary, are within the ability of my husband to pay, and that it will be fair and equitable to require him to pay them:

- | | |
|--|------------|
| (1) For attorney's fees (pending trial) | \$3,500.00 |
| (2) For court costs (including cost of determining community interest) | \$2,000.00 |
| (3) For alimony pendente lite, per month | \$1,500.00 |
| Payable..... | |
| (4) For medical bills | \$ 400.00 |

18. I have answered each of the foregoing questions and given all the information called for as far as within my ability to do so and each answer and statement of fact is true to my own knowledge excepting only such as are stated to be upon information and belief and as to such latter I have stated the sources of my information and I verily believe the same to be true.

(signed) Elaine Shipp

Wife's Signature.

J. F. MORONEY, County Clerk.

By....., Deputy.

Subscribed and sworn to before me, this March 8,
1948.

Helen G. Kaufman
Notary Public, Los Angeles County, California.

FINANCIAL STATEMENTS

Statement of all community property, both real and personal, belonging to husband and wife:

Cash in possession of wife \$.....

Cash in possession of husband \$.....

No.	Description	Gross Value	Incum- brances	Gross Income	Fixed Charges	Net Income
....	Bank deposits	\$200,000	defendant	informed	and	believes
....	All of the stock or interest in 440 homes	1,000,000	"	"	"	"
....	Metropolitan Finance Corpora- tion of California, a Dela- ware Corp.)))))
....	Metropolitan Finance Corpora- tion)))))
....	Investors Realty Corporation)))))
....	Summit Realty Corporation)))))
....	Chesley Finance Corporation)))))
....	Summit Investors Corporation)))))
....	Five automobiles — Cadillac Dodge, Plymouth, Dodge Truck, Mercury	\$10,000				

\$1,000,000 Defendant is
informed and believes

Statement of all separate property, both real and personal, owned by wife:

House 1144 Kagawa Avenue	1500	\$10,000	100	none
(mother has \$4500 interest in house)			per mo.	

Statement of all separate property, both real and personal owned by husband: not known [36]

“EXHIBIT D”

Waters, Arditto and Waters
621 Roosevelt Building
727 West 7th Street
Los Angeles, California
Attorneys for Defendant
Phone:—MA 6-5133

In the Superior Court of the State of California in and for the County of Los Angeles.

Everett S. Shipp, Plaintiff, vs. Elaine Shipp, Defendant. No. D 356410.

ORDER

The hearing on plaintiff's and cross-defendant's order to show cause dated March 5, 1948, and defendant's and cross-complainant's order to show cause dated March 9, 1948, supported by defendant's and cross-complainant's original affidavit of March 8, 1948, and her amended affidavit of April 10, 1948, came regularly on for hearing on the 16th day of April 1948, and was continued through the 19th day of April 1948 before Department 20 of the above entitled court and the court being fully advised in the premises and with stipulations of the above named parties before it, now makes the following order in the above entitled matter:—

(1) The plaintiff and cross-defendant (hereinafter called plaintiff) shall pay to the defendant and cross-complainant (hereinafter called the defendant) the sum of Four Hundred and Fifteen (\$415.00) Dollars on April 15, 1948, for *an* on account of defendant's living expenses. This sum shall be paid through defendant's attorneys. The sum of \$415.00 shall also be paid to [37] defendant,

through said attorneys, on the 15th day of each following month thereafter until time of trial.

(2) The plaintiff shall pay the sum of \$184.35 to the defendant on or before April 23, 1948. This sum shall be paid through defendant's attorneys and is to cover \$100.50 of bills already paid by defendant and to cover \$83.85 of bills which have been incurred by defendant but not paid as of the date of this order by defendant.

(3) The plaintiff shall, on or before April 23, 1948, pay directly to the following individuals the following sums for nursing services rendered to the defendant above named:—

(a) Mrs. Berg—\$431.00

(b) Miss Larkin—\$120.00

(4) The plaintiff shall, on or before April 23, 1948, pay to Mrs. Washington through said attorneys, the sum of \$62.50 for housemaid services rendered to the defendant above named between April 1, and April 15, 1948.

(5) The plaintiff above named shall pay, through Dr. John C. Sharpe of 120 South Laskey Drive, Beverly Hills, California, the reasonable value of all medical services heretofore or hereafter to be rendered to the defendant above named, provided said Dr. Sharpe believes said services to be or have been necessary.

The plaintiff shall also pay through said Dr. Sharpe all reasonable nursing bills presented to Dr. Sharpe by any nurses who may, on or after April 15, 1948, render nursing services to the defendant above named.

The plaintiff above named shall also pay through said Dr. Sharpe all reasonable bills, presented to said Dr. Sharpe for drugs, medicines, dressings, etc. by the defendant above named as long as it was reasonably necessary to incur said bills.

(6) The plaintiff above named shall, on or before May 1, 1948, pay to I. G. Magnin & Co. the sum of \$799.50 per their bill [38] rendered to the defendant above named and dated March 3, 1948.

(7) The plaintiff above named shall, on or before May 1, 1948, pay Barker Bros. about \$69.00 per bill heretofore rendered to Mrs. Shipp by said Barker Bros., such payment to be made by plaintiff only if said bill is unpaid as of May 1, 1948.

(8) The plaintiff above named shall, on or before May 17, 1948, pay directly to Waters, Arditto and Waters, attorneys for defendant above named, the sum of \$5000.00, on account, for legal services rendered to date and to be rendered to defendant above named; this allowance, on account, is made pending trial of this matter and the true value of said legal services (heretofore rendered or to be rendered in the future) shall be determined by the court at the time of trial of this action. Plaintiff herein is to be given credit for the \$1000 heretofore paid to said attorneys and thus need only make a net payment to said attorneys of \$4000.00 on or before May 17, 1948.

(9) The plaintiff above named shall pay to the notary taking the same, the cost of taking the deposition of the plaintiff or the defendant above named if the same or

either of them, are taken at the will of either of the above named parties.

(10) The plaintiff above named shall, on or before April 23, 1948, pay directly to Waters, Arditto and Waters, the attorneys for the defendant above named, the sum of \$410 as reimbursement of costs reasonably incurred by said attorneys in the amount of \$235 as of the date of this order and also in the amount of \$175.00 on account to cover costs reasonably expected to be incurred prior to the trial of the above entitled matter.

(11) The plaintiff above named shall on or before April 23, 1948, pay, on account, the sum of \$500 for auditing services rendered to the defendant above named by Lybrand, Ross & Montgomery, a firm of certified public accountants. This payment, on account shall be made through the defendant's attorneys hereinbefore mentioned. This payment [39] is merely made on account and the defendant above named must justify the same as being reasonable and also justify the necessity for such services and any similar services heretofore rendered or hereinafter to be rendered to said defendant.

(12) The plaintiff above named, shall pending trial of this matter or further order of this court, be restrained and enjoined from:—

- (a) Molesting defendant either directly or indirectly through other persons;
- (b) Knowingly being in defendant's presence;
- (c) Interfering, directly or through other persons, with defendant's use or possession of the 1947 Cadillac if defendant legally regains possession of the same.

- (d) Causing or permitting any stock, that has been or will be issued to plaintiff, by Metropolitan Finance Corporation of California, or Metropolitan Finance Corporation, or Chesley Finance Corporation or Investors Realty Corporation or Summit Realty Corporation to be transferred or conveyed to another person, corporation or other type of business entity;
- (e) Causing or permitting plaintiff's evidence of ownership in the corporations mentioned in (d) *supra*, to be changed on the books of said corporation;
- (f) Transferring, assigning, selling, disposing, conveying, or encumbering any real or personal property of the parties above-named or either of them, whether such property is the community property of said parties or the separate property of either of said parties, except that plaintiff may make such transfers, etc. as may be reasonably necessary in order to:— [40]

- (1) Comply with this order;
- (2) To pay his current living expenses;
- (3) To pay a reasonable fee to his attorney, J. Edward Haley, for Mr. Haley's services in the above entitled matter.

(13) The defendant is to remain in possession of the home used by the parties hereto which is located at 641 Toyopa Drive, Pacific Palisades, California, for her use as a home free from molestation by the plaintiff or by others under his control; however, the plaintiff shall retain exclusive possession of his bedroom in said home for storage purposes only, and may place a lock on the door of said bedroom if he so desires.

(14) The plaintiff above named in using the bedroom of said home for storage purposes shall abide by the following:—

- (a) His use for such purposes shall be only such as shall be reasonably necessary.
- (b) His visits shall be as infrequent as is possible.
- (c) Before each visit to said bedroom for said purposes he must notify defendant's attorneys of his proposed visit.
- (d) Such visits must be made at reasonable hours.

(15) The hearing on the above entitled matters shall hereby be continued until 9:00 o'clock A. M. on May 10, 1948, before Department 20 of the above entitled court for the following purposes.

- (a) To determine what further amounts shall be allowed to the defendant above named, pending trial, for auditing services heretofore rendered or hereafter to be rendered to defendant.
- (b) To determine what further amounts shall be allowed to the defendant above named, pending trial, for services heretofore rendered or hereinafter to be rendered to [41] defendant by an investigator or investigators.
- (c) To determine the extent to which this order has been complied with as of this date.
- (d) To make such other and further order as to the Court may seem proper.

Dated: May 14th, 1948.

(Signed) JOSEPH W. VICKERS

Judge of the Superior Court [42]

vs. Ellsworth W

E. S

Metropolit
Cor
of Con
Preferred

Owned by	
Metropolitan Finance Corporation of California	—
Chesley Finance Corporation	6,262.3 25%
Metropolitan Finance Corporation	(12,058.3 (48%
Investors Realty Corp.	—
Summit Realty Corporation	—
E. S. Shipp	4,042.53
Elaine Shipp	—
Dave X. Marks	142 .56%
Robert L. Shipp	47
Others	2,458.86 10%
Total	25,01

3]

[Affidavit of Service b

[Endorsed]: Filed Ma
Clerk. [44]

(14) The plaintiff above named in using the bedroom of said home for storage purposes shall abide by the following:—

- (a) His use for such purposes shall be only such as shall be reasonably necessary.
- (b) His visits shall be as infrequent as is possible.
- (c) Before each visit to said bedroom for said purposes he must notify defendant's attorneys of his proposed visit.
- (d) Such visits must be made at reasonable hours.

(15) The hearing on the above entitled matters shall hereby be continued until 9:00 o'clock A. M. on May 10, 1948, before Department 20 of the above entitled court for the following purposes.

- (a) To determine what further amounts shall be allowed to the defendant above named, pending trial, for auditing services heretofore rendered or hereafter to be rendered to defendant.
- (b) To determine what further amounts shall be allowed to the defendant above named, pending trial, for services heretofore rendered or hereinafter to be rendered to [41] defendant by an investigator or investigators.
- (c) To determine the extent to which this order has been complied with as of this date.
- (d) To make such other and further order as to the Court may seem proper.

Dated: May 14th, 1948.

(Signed) JOSEPH W. VICKERS

Judge of the Superior Court [42]

"EXHIBIT E"

E. S. SHIPP CORPORATE INTERESTS
STOCK OWNERSHIP

As at December 31, 1947

Owned by	Metropolitan Finance Corporation of California		Chesley Finance Corporation		Metropolitan Finance Corporation	Investors Realty Corporation,	Summit Realty Corporation
	Preferred	Common	Preferred	Common	Common	Common	Common
Metropolitan Finance Corporation of California	—	—	—	—	—	—	—
Chesley Finance Corporation	6,262.3 25%	—	—	—	2,250 9%	—	—
Metropolitan Finance Corporation	(12,058.3 (48%	500 100%	—	—	—	—	—
Investors Realty Corp.	—	—	—	—	—	—	—
Summit Realty Corporation	—	—	—	—	—	—	—
E. S. Shipp	4,042.531	—	11,967 96%	12,074½ 96.60%	18,124 75%	2,500 100%	2,500 100%
Elaine Shipp	—	—	—	100 .80%	—	—	—
Dave X. Marks	142 .56%	—	—	—	245 1%	—	—
Robert L. Shipp	47	—	—	—	1	—	—
Others	2,458.869 10%	—	533 4%	325½ 2.60%	3,663 15%	—	—
Total	25,011	500	12,500	12,500	24,283	2,500	2,500

[43]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 25, 1948. Edmund L. Smith,
Clerk. [44]

[Title of District Court and Cause]

STATEMENT OF REASONS AND OPPOSITION
OF DEFENDANTS' MOTION TO REMAND
CAUSE TO SUPERIOR COURT IN AND FOR
THE COUNTY OF LOS ANGELES, STATE OF
CALIFORNIA, OR TO DISMISS ACTION AND
POINTS AND AUTHORITIES

To the Defendants Ellsworth Wood and Elaine Shipp and
to Messrs. Waters, Arditto and Waters and James J.
Arditto, Esq., Their Counsel:

The plaintiff received a Notice of Motion to Remand
or Dismiss the action, together with Points and Authori-
ties, on May 21, 1948. On May 25, 1948, the plaintiff
received the Affidavit of James J. Arditto in support of
Motion to Dismiss or Remand, together with exhibits.

The plaintiff above named opposes the defendants' Mo-
tion to Remand or Dismiss action, and makes the follow-
ing statements of its reasons and opposition thereto, as
provided in Rule 3(d) of the Local Rules of the District
Court:

I.

That the action pending in the Superior Court of the
State [45] of California, in and for the County of Los
Angeles, No. D356410, is between Everett S. Shipp, as
plaintiff, and Elaine Shipp, as defendant. These are the
only parties to this cause of action, as more fully appears
by referring to Exhibit "A" attached to the Affidavit of
James J. Arditto.

The action pending in this court is between a corporation, to wit, The Metropolitan Finance Corporation of California, as plaintiff, and Ellsworth Wood and Elaine Shipp, as defendants. It, therefore, appears that the plaintiff in this cause and the defendant Ellsworth Wood are not parties to the action pending in the State court.

The plaintiff in this cause claims the ownership, possession and title to the Cadillac automobile. The defendant, Ellsworth Wood, alleges in his Answer that since April 4, 1948, he has been the owner of said automobile, and that he is now entitled to the possession thereof. The defendant, Elaine Shipp, alleges that she has been the owner of the said automobile since March 1947 and is now entitled to the possession thereof.

II.

That the Motion of the defendants alleges, on page 2 thereof, beginning at line 1, that on March 9, 1948, Honorable Orlando H. Rhodes, Judge of said Superior Court, issued an order restraining Everett Shipp from interfering with Elaine Shipp's use of the said Cadillac automobile. That on page 2 of the Affidavit of James J. Arditto, at line 5, a similar statement is made, and reference is made to Exhibit "C", but the defendants have failed to attach a copy of said Exhibit "C". That said order is directed against Everett Shipp, who is not a party to this action, and that said order was not directed against the plaintiff in this action, to wit, The Metropolitan Finance Corporation of California, nor could the same have been so directed for the reason that the plain-

tiff in this action was not a party and is not now a party to the action pending in said State court. [46]

III.

That there are no allegations in the Answer of either of the defendants supporting the statement that Everett S. Shipp owns at least seventy-six per cent (76%) of the stock of the plaintiff. That in this connection the fact is that the plaintiff corporation was organized at or about July 7, 1923, in Wilmington, Delaware, and that the said Everett S. Shipp was one of the organizers of said corporation. That as will appear from Exhibit "A", attached to the Affidavit of James J. Arditto, the said Everett S. Shipp and the defendant Elaine Shipp were married on April 22, 1940. That the plaintiff corporation has fifty-one (51) stockholders, with total outstanding shares of twenty-five thousand and eleven (25,011), and that out of said entire outstanding stock the said Everett S. Shipp owns four thousand forty-two and one-half (4,042½) shares.

IV.

That there has been submitted to counsel for the defendants, in accordance with the pretrial hearing, among other things, the following documents which are attached hereto and made a part hereof:

Exhibit A Purchase contract for said automobile.

Exhibit B Check of Metropolitan Finance Corporation for \$100.00.

Exhibit C Receipt from Don Lee showing payment of \$3,033.09.

Exhibit D Check of Metropolitan Finance Corporation payable to Don Lee, for \$3,033.09.

Exhibit E Copy of Certificate of Ownership issued by the Motor Vehicle Department.

That it would appear from the foregoing that the automobile in dispute in this action was originally purchased by the plaintiff corporation and the purchase contract made in the name of the plaintiff corporation with a deposit of \$100.00; that the check for the deposit was issued by the plaintiff corporation; that the final payment at [47] the time of delivery of the automobile was made by the plaintiff corporation; that the title was registered in the name of the plaintiff corporation, and that the defendants do not allege or claim the plaintiff corporation has ever sold or transferred said automobile to them. That the plaintiff corporation is not a party in the State action, and that court is not empowered to determine the rights of the plaintiff corporation, and that the plaintiff corporation has never at any time been under any order of the State court nor has the State court acquired jurisdiction over it.

Dated: June 1, 1948.

Respectfully submitted,

HENRY SCHAEFER, JR.

RAYMOND V. HAUN

WILLIAM GAMBLE

DEXTER D. JONES

By Henry Schaefer, Jr. [48]

“EXHIBIT A”

NEW CAR PURCHASE CONTRACT

Los Angeles, Calif., Nov. 17, 1945

(1) The undersigned, hereinafter known as the Purchaser, hereby agrees to purchase from Don Lee, Inc., a California Corporation, of L. A., Calif., hereinafter known as the Seller; One New Cadillac Automobile Series No. 62 body style Sedan with standard equipment except as otherwise specified herein, to be delivered on or about.....19....., or prior thereto at the option of the Seller, at City of L. A., State of Calif.; and subject to the terms hereof agrees to pay therefor the California list price of Price in effect at time of delivery Dollars, (\$.....), plus California State sales tax, of which sum One hundred Dollars (\$100.00) is herewith paid on account of said purchase price, the balance to be paid upon the delivery of the automobile, unless otherwise provided herein. The sales price of said automobile shall be the prevailing California list price of car, extra equipment and accessories, at date of delivery plus California State sales tax, computed as indicated in schedule herein-below. Price of accessories and extra equipment shall be deemed to be price listed in schedule below plus California State sales tax, as indicated in said schedule. Delivery is to be accepted promptly by the Purchaser after notification that the said automobile is ready for delivery. The title to the said automobile shall remain in the Seller, until the purchase price is paid in full.

(2) It is understood and agreed that this automobile is to be secured by the Seller from the manufacturer and delivery by Seller is subject to delivery by manufacturer to Seller. The price stated herein is based on the present

list price of said manufacturer, and in case said manufacturer raises his price prior to delivery of this automobile then the Seller may raise the price herein stated accordingly.

(3) This acceptance is subject to the proviso that if any tax or other charge is imposed by the Federal, State, County or Municipal Government upon the manufacturer or this company, or upon the automobile delivered, the amount of such tax shall be added to the price of the automobile and paid by the purchaser hereunder.

(4) The Purchaser understands and agrees that this automobile is warranted by the manufacturer and not by the Seller and only in accordance with the printed warranty of the manufacturer on the back hereof.

(5) The Purchaser agrees that the automobile hereby purchased is for the use of the Purchaser, and that he is not acting as agent for any other person, and does not intend to transfer such automobile to any other party, and agrees that this contract is not assignable by said Purchaser without written consent of Seller.

(6) In the event that the model or series of automobile ordered is discontinued or mechanical or body specifications changed, Purchaser will accept another automobile made by the same manufacturer, the price of which reasonably approximates the contract price of the automobile ordered. Purchaser will receive credit for or pay the differential.

(7) No delay in delivery shall affect this contract unless it exceeds twelve (12) months from date of this contract, in which event either party may cancel this order and Seller will refund any cash deposit subject to the provisions of paragraph 8.

(8) If Seller takes used car as part of purchase price, Purchaser will execute bill of sale conveying title to Seller, or its nominee, upon delivery thereof to Seller. If car purchased hereunder is not delivered for any reason and regardless of fault, Seller may, at its option, in addition to any other remedies, (1) return used car to Purchaser after Purchaser pays all charges for repairs, storage, equipment, taxes, pay-off or other outlay or charge, or (2) Seller may pay Purchaser amount of agreed credit less (a) thirty-five percent (35%) of gross amount, (b) disbursements by Seller for pay-off, or (3) if used car has been sold by Seller, it may pay Purchaser amount received from sale less (a) thirty-five percent (35%) of gross amount received, (b) any sums expended in repairs or equipment, (c) disbursements by Seller for pay-off. Both parties agree that the thirty-five percent (35%) deductions above mentioned are based on handling cost and the fact that trade-in allowances are usually higher than cash sales price of used cars.

(9) Credit on used car trade-in, if any, shall not be effective until actual physical possession of used car (as same is defined in bill of sale covering said car), together with California certificates of ownership and registration properly endorsed by registered and legal owners are delivered to Seller. Subject to provisions of paragraph 8 hereof, this order shall be fulfilled whether or not trade-in is actually effected.

(10) There Are No Understandings, Agreements, Representations or Warranties, Expressed or Implied, Not Specified Herein Respecting This Contract or the Goods Hereby Purchased, and Buyer Expressly Acknowledges and Agrees That He Knows That No Salesman or Agent of the Seller, Other Than the Manager or Sales Manager

of the Seller Has Any Right or Authority to Bind the Seller in Any Respect Whatsoever, and Buyer Does Hereby Acknowledge That He Has No Claim Against Seller by Virture of Any Acts, Conduct, Omissions or Statements Made by Any Salesman or Agent of Seller Prior to the Execution of This Contract.

(11) This Order is Not Binding Upon the Seller Until Accepted in Writing, Signed by Manager or Sales Manager.

Note: Do not fill in prices on future orders if delivery is to occur beyond series current at date of order.

Cash List Price of		Detail of Down Payment and Terms	
Standard Equipped car	\$	Cash with order	\$100.00
State Sales Tax on Car		Cash on delivery	
Extra Equipment and		Trade \$..... Less Pay-off \$	
Accessories		Balance to be paid on Time	
Hyd. Metal		Contract	
Radio			Total \$
Heater			finance plan
	Total	Time payments on	
State Sales Tax, Extra			
Equipment and Accessories			
Total Sales Price			
Fees: Registration \$		Plus financing charges	
License: \$3.00		Terms approved	Office Manager
Total Payable \$		Motor No.	Del'd. Charge No.
Name	Address		
License Metropolitan Finance Corpo-			
ration			
Remarks No trade.		(Housing Construction)	
		[Stamped]: Order subject to pres-	
		ent and future governmental regula-	
		tions.	
Salesman H. O. Wise		Approved Amount—Trade	
Accepted for Don Lee Inc.		\$	
the Seller			
By Gatty Jones		Purchaser's Signature	
		Metropolitan Finance Corporation	
		Address	
		By E. S. Shipp	
		4283 Crenshaw	
		Office Cards	Factory Card Mailed

☐ New Order. ☐ Resale Order.

“EXHIBIT B”

54th and 4th Avenue Office

2600 West 54th Street

California Bank

No. 31545

Commercial - Savings

16-150

Los Angeles, Calif.

METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA

4283 Crenshaw Boulevard

Los Angeles, Calif., November 17, 1945 \$100.00

Pay One Hundred and no/100

to the

Order

of

┌

┐

Don Lee, Inc.

└

┘

METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA

By E. S. Shipp

[Stamped]: 162 31

[Stamped on Back of Check]:

28 Pay to the Order of 28 Security-First National
Bank of Los Angeles Don Lee Don Lee, Inc.

28 Seventh & Witmer Br. 28 16-263 Nov 19
1945 Pay to the Order of Any Bank or Banker or
Through Los Angeles Clearing House All Prior Endorse-
ments Guaranteed Security-First National Bank 16-3
of Los Angeles 16-3

[Perforated]: Paid 11.19.45 [50]

"EXHIBIT C"

[Crest]

DON LEE

Incorporated

7th and Bixel Streets

Phone: TRinity 8411

Los Angeles 14, Calif., March 10, 1947

To Metropolitan Finance Corp. of California

4283 Crenshaw

Los Angeles, California

Net Cash CC-C5216 Your Order No.

1947 Cadillac, Series 61, 5P Sedan, Motor No.

5420612 \$3008.26

City Tax 14.84

State Tax 74.18

Lic. Fees 35.81

\$3133.09

Less Previous Cash Deposit 100.00

Cash on Delivery \$3033.09

Job No. 6109

Body No. 399

Color No. 10, Trim 34

Key Nos. 8502, 8654

Sales Price of Materials Is Indicated Price Plus

California State Sales Tax

[Stamped]: Entered Mar 1947 Paid Don Lee, Inc.

Mar 10 1947 Los Angeles By B. Nevarez

[Written]: 253 Charge to ✓ CR Acct Rec

100.00 ✓ [51]

“EXHIBIT D”

33 - Leimert Park Branch - 16-308

Citizens National Bank

No. 1374

Trust & Savings
of Los Angeles
3423 West 43rd Place
Los Angeles, California

METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA
4283 Crenshaw Blvd.

Los Angeles 43, Calif., March 8, 1947 \$3,033.09

Pay
to the
Order

of

┌

Don Lee Inc.

┐

└

┘

METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA

By E. S. Shipp.

[Endorsements on back of check]:

28 Pay to the Order of 28 Security-First National
Bank of Los Angeles Don Lee Don Lee, Inc.

28 Seventh & Witmer Branch 28 16-263 Mar 11
1947 Pay to the Order of Any Bank or Banker or
Through Los Angeles Clearing House All Prior Endorse-
ments Guaranteed Security-First National Bank 16-3
of Los Angeles 16-3

[Perforated]: Paid 3.10.47 [52]

"EXHIBIT E"

1947

AUTOMOBILE

CALIFORNIA

CERTIFICATE OF

OWNERSHIP

Residence, County of

Code

Name Metropolitan Finance Corp of Calif

Address 4283 Crenshaw

Code

Los Angeles Calif

19-LA

Registered Owner

Registration No. 8S2223

Engine No. 5420612

Make & Cyls. Cad 8

Body Type 5P Sed

Date First Sold 3-10-47

Year 1947

Date Issued 3-27-47NC AE-47

Model

Serial No. Same

Vehicle

Model 61

Previously

Regis.

License

Registered in

Fee \$3.00

Fee \$32.81

D350

ko

Legal Owner or Lien Holder

of Record with Dept.

Division Use Only

yes

42.00

L A

[53]

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION TO REMAND
OR TO DISMISS

I.

In order for the Federal Court to dismiss an action because of a prior suit pending in the State Court, it must appear that the action in the State Court is between the same parties as the action brought in the Federal Court.

Boston Acme Mines Corporation vs. Salina Canyon Co., 3 Fed. (2nd) 729, 734.

II.

It must further appear that it is necessary for the Court in a determination of the cause to have in its possession or control the property which is the subject of the suit. In *Pennsylvania General Casualty Co. vs. Pennsylvania*, it is indicated that unless it is necessary for the Court to actually exercise jurisdiction over the property, such as in a receivership proceeding, that the general rule would be followed that both Courts would retain jurisdiction until judgment is obtained in one Court which may then be set up as *res judicata* in the other.

III.

The plaintiff corporation must be regarded as a separate entity and not a party to the State Court action until facts of unity of interest sufficient to permit disregarding the corporate entity are approved and until such is affirmatively shown, the corporation is a separate and distinct entity from any of its stockholders.

Relley vs. Campbell, 134 Cal. 175

Fletcher Cyclopedia Corporations, Vol. 1, Section 41, page 142.

IV.

Concentration of stockholders and ownership and control are not alone sufficient to permit disregarding the corporate entity. [54]

Welfare Investment Co. vs. Stowell, 6 Cal. App. 2d, 444. [55]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 1, 1948. Edmund L. Smith, Clerk. [56]

[Title of District Court and Cause]

COUNTER AFFIDAVIT OF HENRY SCHAEFER,
JR. IN OPPOSITION OF MOTION TO DIS-
MISS OR REMAND

State of California,
County of Los Angeles—ss.

Henry Schaefer; Jr., being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled matter. That the Affidavit of James J. Arditto in Support of the Motion to Dismiss or Remand was received by affiant on May 25, 1948.

That with respect to the divorce action pending in the Superior Court between Everett S. Shipp and Elaine Shipp, one of the defendants herein, this affiant alleges that he is not, nor is any member of his firm, representing the said Everett S. Shipp in said divorce action, but as will appear from Exhibit "A" attached to the Affidavit of James J. Arditto, said Everett S. Shipp is represented by J. Edward Haley. [57]

That so far as this affiant knows, there is no litigation pending in the Superior Court of Los Angeles County, or any other court in any other place, between the plaintiff in this action, The Metropolitan Finance Corporation of California, and the defendant, Elaine Shipp, and that there is no action therefore to which this cause could be remanded. That this cause was originally filed in the above entitled court because of the diversity of citizenship of the plaintiff and the defendants, and the amount involved is over Three Thousand Dollars (\$3,000.00), and that this cause of action was not removed to this court from the State court.

That the defendant, Elaine Shipp, has filed her Answer in the above entitled matter and merely alleges that Everett S. Shipp owns at least eighty-five per cent (85%) of the stock of the plaintiff corporation, but makes no further allegations which are sufficient to pierce the corporation veil. That the affiant requested the Secretary of the plaintiff corporation to prepare a list of stockholders and the number of outstanding shares of each stockholder and the total number of shares outstanding. That from said list as prepared by said Secretary, it would appear there are twenty-five thousand and eleven (25,011) shares of the capital stock of the plaintiff outstanding, which are owned by fifty-one (51) different stockholders; that from said list it appears that said Everett S. Shipp is the owner of four thousand forty-two and 531/1000 (4,042.531) shares, and that the other fifty (50) stockholders own the remaining number of shares.

That so far as this affiant can ascertain, the plaintiff in this action has never been enjoined or restrained in its use or possession of the said Cadillac automobile which is the subject of this litigation.

That it will appear from the examination of the Answers filed herein of the defendants Elaine Shipp and Ellsworth Wood, that each of said defendants claims to be the owner of said Cadillac auto- [58] mobile, and each is entitled to the immediate possession thereof. That the defendant, Ellsworth Wood, is not a party to the action in the State court, and that the claims of the plaintiff and the defendants in this action can only be adjudicated in this court which has acquired jurisdiction over all of the parties and over the automobile, which is the subject of litigation by reason of the seizure of the same by the United States Marshal under claim and delivery. That

the defendants did not exercise their right to have re-delivery of said automobile by posting a bond within the time prescribed by law.

That the said Everett S. Shipp, so far as this affiant can ascertain, never has had title to said automobile and the same could not be the subject of property between he and the defendant Elaine Shipp either as community property or her separate property. It will appear from plaintiff's reasons for opposition that the plaintiff entered into an agreement to purchase on November 17, 1945, with Don Lee, Inc., Cadillac distributor; that this plaintiff paid its corporate check on November 17, 1945, to said Don Lee, Inc., for One Hundred Dollars (\$100.00); that on March 8, 1947, this plaintiff paid to Don Lee, Inc. Three Thousand Thirty-Three and 09/100 Dollars (\$3,033.09) by issuing its corporate check, and that on March 10, 1947, this plaintiff received a receipt for said \$3,033.09. That it will also appear from the opposition that the registration of said automobile was at the time of purchase registered in the name of the plaintiff, and this affiant alleges the same has remained in the plaintiff's name and now is in the plaintiff's name, and the plaintiff has not transferred the automobile to any person.

HENRY SCHAEFER, JR.

Subscribed and sworn to before me this 1st day of June, 1948.

(Seal)

DEXTER D. JONES

Notary Public in and for the County of Los Angeles,
State of California [59]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 1, 1948. Edmund L. Smith,
Clerk. [60]

[Title of District Court and Cause]

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF
DEFENDANTS' MOTION TO REMAND OR TO
DISMISS THE ABOVE ENTITLED ACTION

State of California

County of Los Angeles—ss.

James J. Arditto, being first duly sworn on oath, deposes and says:

That he is a member of the law firm of Waters, Arditto and Waters; that he is one of the attorneys for the defendants above named and that the following is within his own personal knowledge:

That on June 4, 1948, Elaine Shipp, one of the defendants above named and the defendant and cross-complainant in the action pending in the Superior Court in and for the County of Los Angeles, State of California and referred to in the original affidavit of the undersigned filed herein, did, through and by [61] stipulation with Mr. Shipp (through his attorney) execute and file an amended answer and an amended cross-complaint in said Superior Court proceeding; that a copy of said amended answer and amended cross-complaint are attached hereto as Exhibits A and B respectively. That Paragraphs II and III of the affirmative amended answer and Paragraphs V and VI of the amended cross-complaint place in issue, beyond all per adventure of doubt, the alleged non existence of a separate entity on the part of the plaintiff in the above entitled action.

That Paragraph 7 of the Amended Cross-Complaint and Paragraph 7 of the Affirmative Amended Answer clearly allege the facts which, if proved will require a decree, by

said Superior Court, quieting title in the 1947 Cadillac in the defendant herein and therein Elaine Shipp.

That as disclosed by the pleadings on file herein Ellsworth Wood has a major remainder interest in the Cadillac in question after Elaine Shipp's life interest expires.

That as disclosed by Exhibit E, attached to the undersigned's original affidavit filed herein, Mr. Shipp owns about 81% of the stock of the above named plaintiff by virtue of the following:

(1) He owns 16% or 4,042.531 shares directly.

(2) He owns 96.6% of the 25% owned by Chesley Finance Corporation because he is the owner of 96.6% of said Chesley's shares. This gives him a 24.15% additional interest in the plaintiff above named.

(3) Mr. Shipp owns another 40.2% of the outstanding shares of stock in plaintiff above named by virtue of the following:

Metropolitan Finance Corporation owns 48% of the stock of the plaintiff above named; Mr. Shipp owns 75% of the stock of Metropolitan Finance Corporation directly and owns 8.7% of Metropolitan Finance Corporation by virtue of the fact that he owns 96.6% of [62] the stock of Chesley Finance Corporation, which in turn owns 9% of the stock in Metropolitan Finance Corporation; thus Mr. Shipp owns 83.7% of the stock of Metropolitan Finance Corporation which in turn owns 48% of the stock of plaintiff above named, and thus, Mr. Shipp owns 83.7% of 48% or 40.2% of the stock of the plaintiff above named by virtue of his stock holdings in Metropolitan Finance Corporation and Chesley Finance Corporation.

That by virtue of his direct and indirect stock holdings in plaintiff above named, plaintiff is the owner of the following shares of stock in the plaintiff above named:

4,042.531—directly;

6,037.06 —because of his 96.6% interest in Chesley Finance Corporation;

10,054.42 —because of his stock interest in Metropolitan Finance Corporation and Chesley Finance Corporation.

20,134.011 Total

In other words Mr. Shipp owns 20,134.011 shares of stock in the plaintiff above named which has issued and outstanding a total of 25,011 shares of stock.

That J. Edward Haley has been the attorney for the plaintiff above named for the past sixteen years; that the undersigned is informed and believes and therefore alleges upon such information and belief that the law firm representing the plaintiff in this action has never prior to the bringing of this action represented the plaintiff above named.

That the Superior Court herein before referred to acquired jurisdiction of the subject matter of this action thirty-three (33) days before the commencement of this action by virtue of the cross-complaint filed in said Superior Court by Mrs. Shipp and by virtue of the Honorable Orlando H. Rhodes' injunction and restraining [63] order of March 9, 1948, which is attached to the undersigned's original affidavit herein and marked Exhibit C thereto. That ever since March 9, 1948, the subject mat-

ter of this action has been in the legal custody of said Superior Court.

JAMES J. ARDITTO

Subscribed and sworn to before me this 5th day of June, 1948.

(Seal)

HELEN G. KAUFMAN

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires Sept. 2nd, 1951 [64]

“EXHIBIT A”

Waters, Arditto and Waters

621 Roosevelt Building

727 West 7th Street

Los Angeles 14, California

MAdison 6-5133

Attorneys for Defendant and Cross-Complainant

In the Superior Court of the State of California in and for the County of Los Angeles

Everett S. Shipp, Plaintiff and Cross-Defendant, vs.
Elaine Shipp, Defendant and Cross-Complainant. No.
D 356410

AMENDED CROSS-COMPLAINT

Now comes Defendant and Cross-Complainant by stipulation of the above named parties through their attorneys, and for a cross-complaint against the above named plaintiff and cross-defendant admits, denies and alleges as follows, to-wit:

I.

That cross-complainant, Elaine Shipp and cross-defendant, Everett S. Shipp, were married on or about April 11, 1940, in Las Vegas, Nevada.

II.

That on March 2, 1948, cross-defendant wilfully deserted cross-complainant, and now refused to properly support said cross-complainant without any cause on the part of cross-complainant. That on March 2, 1948, the parties separated as man and wife.

III.

That cross-complainant is now and for a year past has been a resident of the County of Los Angeles, State of California. [65]

IV.

That the following property was acquired after said parties had intermarried and said property was acquired with community funds and is community property:

(1) All the shares of stock in the following alleged corporations:

- (a) Investors Realty Corporation;
- (b) Summit Realty Corporation.

(2) The following shares of stock of the alleged corporations:

- (a) 2500 shares in Metropolitan Finance Corporation of California;
- (b) 1500 shares in Metropolitan Finance Corporation;
- (c) 1500 shares in Chesley Finance Corporation.

(3) The following automobiles:

- (a) Dodge Sedan;
- (b) Mercury Coupe;
- (c) Oldsmobile Sedan;
- (d) Dodge truck.

(4) Bank deposits in the following banks:

- (a) California National Bank, Santa Monica;
- (b) Citizens National Trust & Savings Bank of Los Angeles;
- (c) Security First National Bank of Los Angeles;
- (d) Bank of America National Trust and Savings Association.

(5) Home of the parties hereto at 641 Toyopa Drive, Pacific Palisades, California.

(6) Furniture and furnishings in the home of the parties hereto at said 641 Toyopa Drive, Pacific Palisades, California, except the following which is defendant's and cross-complainant's separate property: [66]

- (a) Oriental rug in living room.
- (b) Bedroom set in her bedroom.
- (c) Coo-coo clock in entrance of home.
- (d) Chinese rose colored rug in dining room.
- (e) Sheffield Tea and Coffee Service in dining room.
- (f) Various sterling silver pieces.

(7) Insurance and annuity policies.

(8) Stocks, bonds and money.

(9) Jewelry, except the jewelry which has been given to defendant and cross-complainant as her own separate property.

(10) A note secured by Deed of Trust on the home and lot situated at 176 South Fuller Street, Los Angeles, California.

(11) Club membership in the following clubs:

- (a) Los Angeles Athletic Club.
- (b) Los Angeles Country Club.
- (c) Del Mar Country Club.

V.

That in addition to the community property listed in Paragraph IV of this amended cross-complaint, defendant and cross-complainant has been informed and believes and upon such information and belief alleges that the community property in an amount of One Hundred Thousand (\$100,000.00) Dollars was accumulated during the marriage of the parties hereto under the following circumstances:

The plaintiff and cross-defendant, during the marriage of the parties hereto had complete control and management of the following alleged corporations and owned and owns the following amount of stock in said alleged corporations and held and holds the following positions in said alleged corporations: [67]

<u>Corporation</u>	<u>Stock Owned</u>	<u>Position Held</u>
Metropolitan Finance Corporation	85%	President and General Manager, and Director
Metropolitan Finance Corporation of California	85%	"
Investors Realty Corporation	100%	"
Chesley Finance Corporation	96%	"
Summit Realty Corporation	100%	"

That during the eight (8) years immediately preceding the marriage of the parties hereto the plaintiff and cross-defendant received a total salary of Forty-Six Thousand, Five Hundred (\$46,500) Dollars from Metropolitan Finance Corporation; that during the approximate eight (8) years of the marriage of the parties hereto, he has re-

ceived from said alleged corporation a salary of Nine (\$9.00) Dollars.

That prior to the marriage of the parties hereto plaintiff and cross-defendant also received an annual salary of Nine Thousand (\$9000) Dollars a year from Chesley Finance Corporation; that since 1942 he had been receiving an annual salary of Forty-two Hundred (\$4200.00) Dollars.

That for the eight (8) years, immediately preceding the marriage of the parties hereto, plaintiff and cross-defendant received about Eighty Thousand (\$80,000) Dollars as salary from the Metropolitan Finance Corporation of California; that during the eight (8) years the parties hereto have been married plaintiff and cross-defendant has received about Seventy-three Thousand (\$73,000) Dollars as salary from said alleged corporation.

That plaintiff and cross-defendant has never received a salary from Investors Realty Corporation and Summit Realty Corporation, which were allegedly incorporated in 1945 and 1947 respectively.

That plaintiff and cross-defendant's duties, functions and [68] responsibilities for all of said alleged incorporations have remained the same since the date of the alleged incorporation of said alleged corporations.

That a reasonable salary, for plaintiff and cross-defendant, for services rendered to all the said alleged corporations during the marriage of the parties hereto was, at least, One Hundred Thousand (\$100,000.00) Dollars more than the salary actually received by said plaintiff and cross-defendant; that by the failure of the plaintiff and cross-defendant to authorize said corporations to pay him a reasonable salary he has been enabled to increase and

he did increase his alleged equity in the said alleged corporations by at least One Hundred Thousand (\$100,000.00) Dollars, through increase of reserves and surplus in said alleged corporations.

VI.

That in addition to the community property referred to in Paragraph IV and V of this amended cross-complaint defendant and cross-complainant is informed and believes and alleges upon such information and belief that the net increase in plaintiff and cross-defendant's equity in the five alleged corporations, since April 11, 1940, has been Two Hundred and Fifty Thousand (\$250,000.00) Dollars; that such increase in said equity is community property of the parties hereto.

That all of said alleged corporations were, since their alleged creation and during the entire period of the marriage of the parties hereto, and now are, mere devices and instruments through which plaintiff and cross-defendant carried on and carries on his business; that plaintiff and cross-defendant has, at all of said times, had complete control and management of and governed and controlled all of said alleged corporations; That failure of the above entitled court to disregard the alleged separate entity of all of said alleged corporations would result in a grave injustice to defendant and cross-complainant and their recognition by the above entitled court, would [69] be highly inequitable; that all of said corporations, at all of said times, have been used, by plaintiff and cross-defendant in an attempt to circumvent the community property laws of the State of California.

That there was, at all times mentioned herein, such a unity of interest and ownership between the plaintiff and cross-defendant and all of said alleged corporations that

separateness of said plaintiff and cross-defendant and of said alleged corporations never existed or it ceased to exist at all times mentioned herein; That the unity of interest and ownership between plaintiff and cross-defendant in all of said alleged corporations is so complete that the failure to disregard the alleged separate entity of said corporations would sanction fraud or promote an injustice against defendant and cross-complainant.

VII.

That defendant and cross-complainant is without means with which to support herself or with which to maintain, prosecute and defend this action; the only separate property she has is as follows:

- (a) 1947 Cadillac;
- (b) Personal effects;
- (c) Some household furniture and furnishings.

That plaintiff and cross-defendant is regularly employed and in business for himself and is well able to pay for said costs; that his annual income for the past fifteen years has averaged Forty-five Thousand (\$45,000.00) Dollars.

VIII.

That since the marriage of said cross-complainant and cross-defendant, the said cross-defendant, in utter disregard of his marriage vows, duties and obligations to cross-complainant herein, has been guilty of extreme cruelty toward cross-complainant and has treated cross-complainant in a cruel and inhuman manner and has wrongfully and, without cause, inflicted upon cross-complainant grievous mental and physical suffering as more particularly charged, alleged and set forth as follows: [70]

(a) That on divers and many occasions, the cross-defendant has struck cross-complainant with his hands and thereby inflicted physical injury upon cross-complainant herein.

(b) That in the presence of servants, the cross-defendant has on divers and many occasions struck the cross-complainant with his hands and thereby inflicted upon the cross-complainant great physical injury and thereby embarrassed and humiliated cross-complainant before said servants.

(c) That in the presence of mutual friends of the parties hereto and in the presence of servants, the cross-defendant has, without cause, on many and divers occasions, engaged in unwarranted and irritating repetitious arguments with cross-complainant while the latter was very seriously ill and the cross-defendant was under the influence of intoxicating liquors and thereby embarrassed and humiliated cross-complainant before said friends and servants.

(d) That cross-defendant, knowing that cross-complainant was seriously ill and had undergone three (3) major operations within the past year attempted to aggravate her illness and delay her recovery by saying, on divers and many occasions, the following:

(I) "You poor, miserable creature."

(II) "You have cancer and you cannot recover."

(III) "You haven't a chance to get well."

(IV) "If I had my way I would give you an overdose."

(V) "I cannot afford to pay all these medical bills."

(e) That cross-defendant on divers and many occasions drank to excess and upon becoming drunk would torment and irritate cross-complainant, although he was well aware of her serious physical condition.

(f) That cross-defendant intentionally and continuously was slamming doors to upset cross-complainant and thus delay [71] or prevent her recovery from said illness.

(g) That cross-defendant on divers and many occasions and while under the influence of intoxicating liquors would, in the presence of mutual friends and the servants, unnecessarily and without cause, complain of the cost of cross-complainant's medical bills and the cost of running the household, and thereby embarrassed and humiliated cross-complainant before said friends and servants.

(h) That cross-defendant has, on divers and many occasions, refused to take cross-complainant on boat trips and other week-end trips he was planning to take and which he took.

IX.

That the foregoing and above acts of cruelty are only a few of the acts wilfully and wrongfully inflicted by the cross-defendant upon cross-complainant and as a result therefrom cross-complainant has suffered great and grievous mental and physical cruelty, embarrassment and deep humiliation, and it has made the marital relation with cross-defendant no longer tolerable.

X.

That said acts have been done without the connivance and collusion of this cross-complainant.

Wherefore, defendant and cross-complainant prays judgment of the above named court as follows:

(a) That plaintiff and cross-defendant take nothing by his action herein;

(b) That defendant and cross-complainant may live separate and apart from the plaintiff and cross-defendant;

(c) That plaintiff and cross-defendant be ordered to pay to defendant and cross-complainant a reasonable sum for her support and maintenance both during the pendency of this action and permanently thereafter; [72]

(d) That plaintiff and cross-defendant be ordered to pay defendant and cross-complainant reasonable attorneys' fees and court costs, including the cost of investigators and accountants used for the purpose of determining the community interest of the parties hereto;

(e) That plaintiff and cross-defendant be enjoined and restrained from selling, transferring, hypothecating or in any manner incumbering or disposing of the community or separate property hereinbefore referred to;

(f) That plaintiff and cross-defendant be enjoined and restrained from molesting or interfering with the defendant and cross-complainant;

(g) That defendant and cross-complainant be given all the community property of the parties hereto;

(h) For such other and further relief as to this court may appear meet and proper in the premises.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendant and Cross-Complainant [73]

[Verified.] [74]

Received copy of the within this 5th day of June, 194..... J. Edmund Haley, Attorney for Ptf. & C. Def. [75]

“EXHIBIT B”

Waters, Arditto and Waters
621 Roosevelt Building
727 West 7th Street
Los Angeles, California
Attorneys for Defendant
Phone: MAdison 6-5133

In the Superior Court of the State of California in and for the County of Los Angeles.

Everett S. Shipp, Plaintiff, vs. Elaine Shipp, Defendant.
No. D 356,410.

AMENDED ANSWER

Now Comes Defendant Elaine Shipp and by stipulation of the parties hereto through their respective attorneys, files her amended answer to plaintiff's complaint herein and admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, and III of the complaint.

II.

Denies the allegations contained in paragraph IV of the complaint.

III.

Denies generally, specifically and positively each, all and every allegation, *atter* and thing contained in paragraph V of the complaint.

IV.

Denies generally, specifically and positively, each, all [76] and every allegation, matter and thing contained in

paragraph VI of the complaint, except that the defendant admits that she is residing at 641 Toyopa Drive, Pacific Palisades, California.

V.

Denies that she has committed, performed or engaged in any acts which would induce or justify the Court to order the defendant to move and vacate 641 Toyopa Drive as alleged in paragraph VII of the complaint.

VI.

Denies that she, a woman of ninety pounds, has made any physical or any other kind of threats toward defendant, a man of two hundred pounds, all as alleged in paragraph VIII of the complaint.

By Way of Affirmative Answer Defendant Alleges as Follows:

I.

That the following property was acquired after said parties had intermarried and said property was acquired with community funds and is community property:

(1) All the shares of stock in the following *alleges* corporations:

- (a) Investors Realty Corporation;
- (b) Summit Realty Corporation.

(2) The following shares of stock of the following alleged corporations:

- (a) 2500 shares in Metropolitan Finance Corporation of California;
- (b) 1500 shares in Metropolitan Finance Corporation;
- (c) 1500 shares in Chesley Finance Corporation.

(3) The following automobiles:

- (a) Dodge Sedan;
- (b) Mercury Coupe;
- (c) Oldsmobile Sedan;
- (d) Dodge Truck. [77]

(4) Bank deposits in the following banks:

- (a) California National Bank, Santa Monica;
- (b) Citizens National Trust and Savings Bank of Los Angeles;
- (c) Security-First National Bank of Los Angeles;
- (d) Bank of America National Trust and Savings Association.

(5) Home of the parties hereto at 641 Toyopa Drive, Pacific Palisades, California.

(6) Furniture and furnishings in the home of the parties hereto at said 641 Toyopa Drive, Pacific Palisades, California, except the following which is defendant's separate property:

- (a) Oriental rug in living room;
- (b) Bedroom set in her bedroom;
- (c) Coo-coo clock in entrance of home;
- (d) Chinese rose colored rug in dining room;
- (e) Sheffield Tea and Coffee Service in dining room;
- (f) Various sterling silver pieces.

(7) Insurance and annuity policies.

(8) Stocks, bonds and money.

(9) Jewelry, except the jewelry which has been given to defendant as her own separate property.

(10) A note secured by Deed of Trust on the home and lot situated at 176 Fuller Street, Los Angeles, California.

(11) Club membership in the following clubs:

- (a) Los Angeles Athletic Club;
- (b) Los Angeles Country Club;
- (c) Del Mar Country Club.

II.

That in addition to the community property listed in paragraph I of this Affirmative Answer, defendant has been informed and believes and upon such information and belief alleges that the [78] community property in an amount of One Hundred Thousand (\$100,000.00) Dollars was accumulated during the marriage of the parties hereto under the following circumstances:

That plaintiff during the marriage of the parties hereto had complete control and management of the following alleged corporations and owned and owns the following amount of stock in said alleged corporations and held and holds the following positions in said alleged corporations:

<u>Corporations</u>	<u>Stock Owned</u>	<u>Position Held</u>
Metropolitan Finance Corporation	85%	President and General Manager and Director
Metropolitan Finance Corporation of California	85%	"
Investors Realty Corporation	100%	"
Chesley Finance Corporation	96%	"
Summit Realty Corporation	100%	"

That during the eight (8) years immediately preceding the marriage of the parties hereto the plaintiff received a total salary of Forty-six Thousand, Five Hundred (\$46,500.00) Dollars from Metropolitan Finance Corporation; that during the approximate eight (8) years of the marriage of the parties hereto, he has received from said alleged corporation a salary of Nine (\$9.00) Dollars.

That prior to the marriage of the parties hereto plaintiff also received an annual salary of Nine Thousand (\$9000) Dollars a year from Chesley Finance Corporation; that since 1942 he had been receiving an annual salary of Forty-two Hundred (\$4200.00) Dollars from said alleged corporation.

That for the eight (8) years, immediately preceding the marriage of the parties hereto, plaintiff received about Eighty Thousand (\$80,000) Dollars as salary from the Metropolitan Finance Corporation of California; that during the eight (8) years the parties hereto have been married plaintiff has received about Seventy-three Thousand (\$73,000) Dollars as salary from said alleged corporation. [79]

That plaintiff has never received a salary from Investors Realty Corporation and Summit Realty Corporation, which were allegedly incorporated in 1945 and 1947 respectively.

That plaintiff's duties, functions and responsibilities for all of said incorporations have remained the same since the date of the alleged incorporation of said alleged corporations.

That a reasonable salary, for plaintiff for services rendered to all the said alleged corporations during the marriage of the parties hereto was, at least, One Hundred

Thousand (\$100,000.00) Dollars more than the salary actually received by said plaintiff; that by the failure of the plaintiff to authorize said corporations to pay him a reasonable salary he has been enabled to increase and he did increase his alleged equity in the said alleged corporations by at least One Hundred Thousand (\$100,000.00) Dollars, through increase of reserves and surplus in said alleged corporations.

III.

That in addition to the community property referred to in paragraphs I and II of this Affirmative Answer, defendant is informed and believes and alleges upon such information and belief that the net increase in plaintiff's equity in the five alleged corporations, since April 11, 1940, has been Two Hundred and Fifty Thousand (\$250,000.00) Dollars; that such increase in said equity is community property of the parties hereto;

That all of said alleged corporations were, since their alleged creation and during the entire period of the marriage of the parties hereto, and now are, mere devices and instruments through which plaintiff carried on and carries on his business; that plaintiff has, at all of said times, had complete control and management of and governed and controlled all of said alleged corporations; that failure of the above entitled court to disregard the alleged entity of all of said alleged corporations would result in a grave injustice to defendant and their recognition, by the above entitled court, would be [80] highly inequitable; that all of said corporations, at all of said times, have been used, by plaintiff in an attempt to circumvent the community property laws of the State of California.

That there was, at all times mentioned herein, such a unity of interest and ownership between the plaintiff and

all of said alleged corporations that separateness of said plaintiff and of said alleged corporations never existed or ceased to exist at all times mentioned herein. That the unity of interest and ownership between plaintiff and all of said alleged corporations is so complete that the failure to disregard the alleged separate entity of said corporations would sanction fraud or promote an injustice against defendant.

IV.

That since the marriage of said plaintiff and defendant the said plaintiff, in utter disregard of his marriage vows, duties and obligations to defendant herein, has been guilty of extreme cruelty toward defendant and has treated defendant in a cruel and inhuman manner and has wrongfully and, without cause, inflicted upon defendant grievous mental and physical suffering more particularly charged, alleged and set forth as follows:

(a) That on divers and many occasions, the plaintiff has struck defendant with his hands and thereby inflicted physical injury upon defendant herein.

(b) That in the presence of servants, the plaintiff has on divers and many occasions struck the defendant with his hands and thereby inflicted upon the defendant great physical injury and thereby embarrassed and humiliated defendant before said servants.

(c) That in the presence of mutual friends of the parties hereto and in the presence of servants, the plaintiff has, without cause, on many and divers occasions, engaged in unwarranted and irritating repetitious arguments with defendant while the latter was very seriously ill and [81] the plaintiff was under the influence of intoxicating liquors and thereby embarrassed and humiliated defendant before said friends and servants.

(d) That plaintiff, knowing that defendant was seriously ill and had undergone three (3) major operations within the past year attempted to aggravate her illness and delay her recovery by saying, on divers and many occasions the following:

- (I) "You poor, miserable creature."
- (II) "You have cancer and you cannot recover."
- (III) "You haven't a chance to get well."
- (IV) "If I had my way I would give you an overdose."
- (V) "I cannot afford to pay all these medical bills."

(e) That plaintiff on divers and many occasions drank to excess and upon becoming drunk would torment and irritate defendant, although he was well aware of her serious physical condition.

(f) That plaintiff intentionally and continuously was slamming doors to upset defendant and thus delay or prevent her recovery from said illness.

(g) That plaintiff on divers and many occasions and while under the influence of intoxicating liquors would, in the presence of mutual friends and the servants, unnecessarily and without cause, complain of the cost of defendant's medical bills and the cost of running the household, and thereby embarrassed and humiliated defendant before said friends and servants.

(h) That plaintiff has, on divers and many occasions, refused to take defendant on boat trips and other week-end trips he was planning to take which he took. [82]

V.

That the above and foregoing acts of cruelty are only a few of the acts wilfully and wrongfully inflicted by the

plaintiff upon defendant and as a result therefrom defendant has suffered great and grievous mental and physical cruelty, embarrassment and deep humiliation, and it has made the marital relation with plaintiff no longer tolerable.

VI.

That said acts have been done without the connivance and collusion of defendant.

VII.

That defendant is without means with which to support herself or with which to defend this action; that the only separate property she has is as follows:

- (a) 1947 Cadillac;
- (b) Personal effects;
- (c) Some household furniture and furnishings.

That plaintiff is regularly employed and in business for himself and is well able to pay therefore; that his annual income for the past fifteen years has averaged Forty-five Thousand (\$45,000.00) Dollars.

Wherefore, defendant prays judgment of the above named court as follows:

- (a) That plaintiff take nothing by his action herein;
- (b) That plaintiff be ordered to pay defendant a reasonable sum for her support and maintenance during the pendency of this action and permanently thereafter;
- (c) That plaintiff be ordered to pay defendant's reasonable attorney's fees and court costs, including investigating and auditing costs relating to termination of community interests;
- (d) That plaintiff be enjoined and restrained from selling, transferring, hypothecating or in any manner

encumbering or [83] disposing of the property listed and hereinbefore referred to;

(e) That plaintiff be enjoined and restrained from molesting or interfering with the defendant;

(f) That defendant be given all of the community property of the parties hereto;

(g) For such other and further relief as to this court may appear meet and proper in the premises.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendant [84]

[Verified.]

[Endorsed]: Filed Jun. 7, 1948. Edmund L. Smith, Clerk. [85]

[Title of District Court and Cause]

ORDER ON MOTION OF DEFENDANTS TO
DISMISS THE ACTION

This cause having heretofore come before the court for hearing on defendants' motion to dismiss the action, and the matter having been argued and submitted for decision; and it appearing to the court:

(1) that the plaintiff, Metropolitan Finance Corporation of California, a Delaware corporation, commenced this action on April 14, 1948, invoking the so-called diversity jurisdiction of this court to recover possession of one Cadillac automobile in accordance with the "claim and delivery" statutes of California [Calif. Code of Civ. Proc., §§509-521], or in the alternative to recover the value of the property, alleged to be \$4,000, if delivery cannot [86] be had;

(2) that on April 15, 1948, at the instance of plaintiff, the United States Marshal for this district took the automobile from the possession of defendant Elaine Shipp pursuant to §§509-512 of the California Code of Civil Procedure [Rule 64 F. R. C. P.] ;

(3) that prior to the commencement of this action a suit for divorce was commenced on March 4, 1948, in the Superior Court of the State of California, in and for the County of Los Angeles, by Everett S. Shipp, as plaintiff, against said Elaine Shipp, as defendant, and this state court action is still pending;

(4) that said Elaine Shipp has alleged in her answer and cross-complaint, filed in said divorce action on March 8, 1948, that the automobile in controversy was and is part of the community property of the marriage of said Everett S. Shipp and said Elaine Shipp;

(5) that in proceedings for divorce under the laws of California the Superior Court of the State of California has jurisdiction to hear and determine all matters relating to the status of property alleged to be community property; and, in order to exercise that jurisdiction with effect, the Superior Court necessarily assumes control of the property in controversy if situated within the state [Huber v. Huber, 27 Cal. (2d) 784, 167 P. (2d) 708 (1946); Salveter v. Salveter, 206 Cal. 657, 275 Pac. 801 (1929); Cal. Civ. Code, §§141-143, 146-149] ;

(6) that on March 8, 1948, when title and right [87] to possession of the automobile were put in issue by Elaine Shipp's answer and cross-complaint, the Superior Court of the State of California, in and for the County of Los Angeles, acquired constructive

possession of said automobile for the purpose of giving effect to the state court's adjudication of that issue [Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189 (1935); United States v. Bank of New York & Trust Co., 296 U. S. 463 (1936)];

(7) that in cases where a state court holds prior actual or constructive possession of property in an in rem or quasi in rem proceeding, a federal district court has no jurisdiction to hear and determine a controversy involving possessory rights in the same res, the effective disposition of which by the federal court would result in interference with the administration of the res by the state court [Princess Lida v. Thompson, 305 U. S. 456 (1939); United States v. Bank of New York & Trust Co., *supra*, 296 U. S. 463; Penn General Casualty Co. v. Pennsylvania, *supra*, 294 U. S. 189; cf. Commonwealth Trust Co. v. Bradford, 297 U. S. 613 (1936)];

(8) that an alternative judgment of this court for the value of the automobile in question would not be proper in the case at bar because delivery can be had, the property being in the actual possession of the Marshal of this court [Claudius v. Aguirre, 89 Cal. 501, 26 Pac. 1077 (1891); Erreca v. Meyer, 142 Cal. 308, 75 Pac. 826 (1904); Webster v. Mountain Monarch Gold Mining Co., 6 Cal. App. (2d) 450, 44 P. (2d) 646 (1935)];

(9) that execution of any judgment of this court [88] in this action ordering delivery of the automobile to the plaintiff would interfere with the administration of that res by the Superior Court of California; and

(10) that this court lacks jurisdiction over the subject matter of this action because of the circumstances stated in (1) to (9) above;

It Is Ordered that the motion of defendants to dismiss the action for want of jurisdiction over the subject matter of the action be and is hereby granted; and counsel for defendants are directed to submit judgment of dismissal accordingly pursuant to local rule 7 within five days.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

June 17, 1948.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed Jun. 17, 1948. Edmund L. Smith, Clerk. [89]

In the District Court of the United States
Southern District of California
Central Division
No. 8130-WM

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Plaintiff,

vs.

ELLSWORTH WOOD, ELAINE SHIPP, JOHN
DOE and RICHARD ROE,

Defendants.

JUDGMENT OF DISMISSAL

This cause came on to be heard on the 7th day of June, 1948, and was argued by James J. Arditto, Counsel for

Defendants, and Henry Schaefer, Jr., Counsel for Plaintiff; and thereupon, upon consideration thereof and memorandum filed, on the 17th day of June, 1948, the Honorable William C. Mathes, District Judge of the above Court

Ordered that defendants' Motion to Dismiss this action, for want of jurisdiction over the subject matter of the action, be sustained; and

It Is Further Ordered, Adjudged and Decreed that this
 for lack of jurisdiction over the subject
 matter of the action [Mathes, J.]
 cause be and hereby is dismissed [^] and that defendants
 recover from plaintiff their costs herein expended.

Dated: June 22, 1948.

WM. C. MATHES
 District Judge

Judgment entered Jun. 23, 1948. Docketed Jun 23, 1948.
 Book 51, page 486. Edmund L. Smith, Clerk; by Louis
 J. Somers, Deputy. [90]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 23, 1948. Edmund L. Smith,
 Clerk. [91]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that The Metropolitan Finance Corporation of California, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals

for the Ninth Circuit from the Judgment of Dismissal entered in this action on June 23, 1948.

Dated: July 9, 1948.

MACFARLANE, SCHAEFER & HAUN

HENRY SCHAEFER, JR.

DEXTER D. JONES

WILLIAM GAMBLE

By Henry Schaefer, Jr.

Attorneys for Appellant, The Metropolitan Finance
Corporation of California

[Endorsed]: Filed & mld copy to Waters, Arditto &
Waters, attys for defts Jul. 13, 1948. Edmund L. Smith,
Clerk. [92]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 95, inclusive, contain full, true and correct copies of Complaint, Claim and Delivery; Separate Answers of Ellsworth Wood and Elaine Shipp; Notice of and Motion to Remand Cause to Superior Court in and for the County of Los Angeles, State of California or to Dismiss Cause; Affidavit in Support of Motion to Dismiss or Remand and

exhibits attached; Statement of Reasons and Opposition of Defendants' Motion to Remand Cause to Superior Court in and for the County of Los Angeles, State of California, or to Dismiss Action and Points and Authorities with exhibits attached; Counter Affidavit of Henry Schaefer, Jr., in Opposition of Motion to Dismiss or Remand; Supplemental Affidavit in Support of Defendants' Motion to Remand or to Dismiss the Above-entitled Action and exhibits attached; Order on Motion of Defendants to Dismiss the Action; Judgment of Dismissal; Notice of Appeal and Designation of Record on Appeal which, together with copy of reporter's transcript of proceedings on June 7, 1948, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$24.50 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28 day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke
Chief Deputy.

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, June 7, 1948

Appearances:

For the Plaintiff: Macfarlane, Schaefer & Haun, by
Henry Schaefer, Jr., Esquire.

For the Defendants: Waters, Arditto & Waters, by
James J. Arditto, Esquire.

Los Angeles, California, Monday, June 7, 1948

10:00 A. M.

(Case called by the clerk.)

Mr. Arditto: May it please the court, this proceeding that we have filed is designated a motion to remand or dismiss. I think it may be well to have a brief resume of the background in this proceeding and the state court proceeding. These facts are all set forth in the various affidavits on file.

In the early part of March of this year, Elaine Shipp, who is the defendant in this Metropolitan case pending here, filed a suit for a divorce from her husband, Everett Shipp. She filed an answer and a cross-complaint asking for separate maintenance and denying the grounds for divorce on the part of Mr. Shipp. A few days later she asked the Department 8 of the Superior Court here in Los Angeles County for an injunction and restraining order restraining Mr. Shipp from, among other actions, of interfering with her possession of a 1947 Cadillac automobile.

The order was issued. It is attached to my original affidavit which is on file herein as Exhibit C.

I might ask counsel at this time if he has received a copy of that Exhibit C? I think, by inadvertence, at the time I served it, you stated it was left off of your copy.

Mr. Schaefer: Yes; I have received it. [2*]

Mr. Arditto: May I ask the court if my Exhibit C is attached to the original and copy that I filed with the court?

The Court: What does Exhibit C consist of?

Mr. Arditto: Exhibit C, it is an order signed by the Honorable Orlando H. Rhodes on March 9, 1948.

The Court: Is that this order to show cause on a printed form?

Mr. Arditto: That is right.

The Court: Yes; it is attached.

Mr. Arditto: That order provides, as I said, among other things that Mr. Shipp was enjoined from interfering with the use and possession by Mrs. Shipp of this 1947 Cadillac.

Thereafter, the state court, by that action, by the filing of the complaint, the cross-complaint, and the injunction, it is our contention that the Superior Court in and for Los Angeles County acquired jurisdiction of this automobile because, among other things pleaded in the complaint, is the fact that that Cadillac is alleged as being part of the community property of the parties, Mrs. Shipp and Mr. Shipp.

The Court: Let me interrupt you here. I notice a stipulation in the file; I signed an order on it May 21st,

*Page number appearing in original Reporter's Transcript.

continuing this hearing until June 21st. Are all parties here? [3]

Mr. Arditto: Yes.

Mr. Schaefer: Yes, sir.

Mr. Arditto: May it please the court, that stipulation is a continuation of the pre-trial proceedings and it was asked for and agreed upon by the parties hereto because we wanted to argue this motion before continuing with the pre-trial.

The Court: It does not cover the motion. Yes; I see now. Your theory is, then, that the state court acquired jurisdiction of the res prior to bringing this action?

Mr. Arditto: That is correct. And we say that the Superior Court in and for the County of Los Angeles acquired jurisdiction over this Cadillac automobile at least 33 days before this action was commenced.

At this point I would like to ask the court's permission to file a supplemental affidavit which I have just, half an hour ago, served on Mr. Schaefer, counsel for the plaintiff herein. I do not believe he has any objection to the filing of it.

The Court: Will you hand it to the clerk? Is there objection to the affidavit being filed and being considered as in support of the motion?

Mr. Schaefer: I have no objection, your Honor. I obviously have not had a chance to answer it or file a [4] counter-affidavit. I have not had an opportunity to check some of the things that are asserted there about stock holdings, but I haven't any objection to the filing of it.

The Court: Is there any question as to the facts with respect to the Superior Court litigation?

Mr. Schaefer: No, your Honor. I believe the facts are stated correctly.

Mr. Arditto: I do not believe there is any dispute except possibly as to stock holdings. Mr. Schaefer in his affidavit alleged that Mr. Shipp only owns 4042. some-odd fractional number of shares of Metropolitan Finance Corporation of California. We, in our original affidavit, set forth that he owned, as I recall, 76 per cent.

The filing of this supplemental affidavit has as its purpose (1) definitely clarifying the facts, as we have set forth on page 2 of the supplemental affidavit, that Mr. Shipp owns at least 81 per cent of the stock of the plaintiff here, either directly or through his stock holdings and for other corporations which, as disclosed by our Exhibit E, which was filed several weeks ago, Mr. Shipp owns either 96 per cent of the stock of those corporations or 80 per cent.

Another purpose of filing this supplemental affidavit is to call the court's attention to the fact that on Friday of last week we filed an amended answer and an amended [5] cross-complaint in the Superior Court proceeding, where we clearly set forth our contention in effect that the corporate entities—this plaintiff as well as these other four corporations that are referred to in the various affidavits that are on file here—should be disregarded because they are in effect mere devices or instruments under which or by which Mr. Shipp carries on or does his business.

The Court: May this court upon motion to remand, where jurisdiction is invoked based upon diversity of citizenship, examine into the corporate entity and determine whether or not the corporation is an alter ego of some individual who is resident in another state?

Mr. Arditto: I believe so, may it please the court, where, as in this case, the husband and wife, the real true parties of all this proceeding, have brought themselves within the jurisdiction of the Superior Court here in the state.

The Court: That is an entirely different ground. There are two grounds as I understand you are alleging: One is that this action in this court, where jurisdiction is invoked based upon diversity of citizenship, is essentially an action in rem, being a claim in delivery and replevin.

Mr. Arditto: That is right; it is an action to quiet title.

The Court: In nature of an action of replevin; that [6] the proceeding in the Superior Court for divorce, involving this same automobile and other property, is such that the Superior Court has jurisdiction in rem to determine title and divide the property, if necessary, or to award it to one or both parties.

Mr. Arditto: I think that is well established.

The Court: And for that reason the state court has prior jurisdiction of the res involved. Now, you assert another ground, as I understand, and that is that this court should now look behind the corporate entity of the plaintiff and find there, instead of a Delaware corporation, a California citizen.

Mr. Arditto: Well, I beg the court's pardon if I have confused it in any manner. I am not making that contention at this time. My contention is based solely—

The Court: I do not see the applicability of the stock ownership question, then.

Mr. Arditto: Well, the reason for calling this court's attention at this time to the amended answer and amended

cross-complaint in the state court proceedings was in recognition of several contentions set forth by the plaintiff herein in his opposition, wherein he alleges that the question of disregard of corporate entity is not in issue in this proceeding. I wanted to make sure that the court's attention was called to the fact that that very issue is [7] one of the issues pending before the Superior Court here in Los Angeles County; and if we are successful therein piercing the corporate veil or in proving that this property is the separate property of Mrs. Shipp, our client, that every issue and every question that can possibly be decided by this court has already been in effect placed in issue in the Superior Court here in Los Angeles County prior to the time this particular action was commenced.

I believe the court is familiar with the usual rule in regard to the acquisition of jurisdiction by the state court in these divorce proceedings, where the parties put in issue the property but, with the court's indulgence, I would like to read a case. I am quoting from *Spahn v. Spahn*, 70 Cal. App. (2d), 791, and my quotation begins on page 796.

"* * * 'Where the property rights are put in issue in a divorce proceeding, either by specific allegations describing such property, or by allegation that no community property existed, the decree is res judicata of such rights.' In the same case at page 681 the rule is stated as follows: 'It may be taken as settled that the jurisdiction of the court in a divorce proceeding over property rights is limited to the property which belongs to the community or which [8] is the separate property of the spouses.'"

I think the most telling language is here, in *Marshall v. Marshall*, 138 Cal. App. 706, 707, the court said:

“ ‘The issue as to the property having been fairly made and by both parties submitted to the court for determination, the court had jurisdiction to determine the question involved as to the character of the property and to quiet the title of the rightful owner thereto’.”

In other words, this case, I believe counsel will agree, states the usually acceptable rule in the state courts, and that is, in a divorce proceeding, once the parties place in issue the various property rights, whether it be community property or separate property, that the court in effect proceeds, in effect, the same as though it were a quiet title proceeding insofar as respective rights of the parties to the property is concerned.

That is exactly what we have here. 33 days before the commencement of this particular action the title to this Cadillac automobile that is the subject matter of this Metropolitan Finance action we are arguing here today was brought within the jurisdiction of the Superior Court here in Los Angeles County by the pleadings; and then, to make it stronger, we proceeded to receive for Mrs. Shipp an injunction and restraint against Mr. Shipp from interfering [9] with her use and possession of this automobile. And we contend that what this proceeding is is an attempt to avoid that injunction and restraint on the part of the Superior Court.

The Court: Have you any authority for this court, upon a motion to remand, to inquire whether or not the Metropolitan Finance Corporation of California, a Dela-

ware corporation, is the same as—what is the individual's name?

Mr. Arditto: E. S. Shipp.

The Court: —E. S. Shipp?

Mr. Arditto: No. But our affidavits set forth—

The Court: Then this is an action, is it not, involving the claim of the third party to this res?

Mr. Arditto: That is exactly it.

The Court: And it is the duty of this court, then, under those circumstances, if jurisdiction of this court is properly invoked, to respect as a matter of comity the orders of the State Court with respect to the res but, nevertheless, to proceed with this litigation.

Mr. Arditto: Well, we are in this position. We have set forth in our affidavit this action was commenced at the instance and request of E. S. Shipp. Set forth in our affidavits, Mr. Shipp is the owner of at least 81.7 per cent of the stock of the alleged corporation. [10]

The Court: The question is: May we inquire into that upon this motion to remand? That all might very well appear upon a trial of the merits.

Mr. Arditto: I believe so, may it please the court, because this court, I think we will all agree, does not have jurisdiction if the State Court acquired jurisdiction of the subject matter of this action prior to the time that this action was commenced.

The Court: The State Court does not purport to have jurisdiction over anything more, does it, than the claims of the two individuals to this automobile? The State Court does not purport to exercise any jurisdiction over the claim of this plaintiff here as a separate corporate entity to the automobile.

Mr. Arditto: That is correct; but the main issue here and the main issue in the State Court and the subject matter of the action here and the subject matter of the action in the State Court action is exactly the same.

The Court: Well, it is an automobile and it happens to be the same automobile.

Mr. Arditto: And the parties are exactly the same.

The Court: That is the question. If you can show me some precedent which will enable me to go into that matter, I will be glad to consider it. But the plaintiff here is a foreign corporation on the face of it, and that foreign [11] corporation has chosen this court, invoking the diversity of jurisdiction of this court in this action.

Now, the question is whether the plaintiff shall be denied access to this court in this action. It is not a removable case.

Mr. Arditto: No. It is a motion to dismiss, actually.

The Court: If you wish to look at some authorities on that question, I will go into the matter of whether or not the plaintiff is the same as some individual citizen of California, namely, Shipp. Do you wish to make some further search into it?

Mr. Arditto: No. I am satisfied that I can't go any farther than we have in our affidavits, setting forth the—

The Court: Have you looked into the question of whether or not I may consider these affidavits upon this motion? In other words, can this court, when a foreign corporation comes here and says it is a corporation chartered under the laws or created by the laws of a certain state and is, therefore, under the holdings of the Supreme Court, to be deemed for these purposes a citizen of that state, may this court take testimony and say: "Ah! But that is a fake. You are really Joe Doakes, a citizen of

California;” or must the court admit for jurisdictional purposes the facts of the creation? It is all a fiction, anyhow.

Mr. Arditto: Well, of course I feel that there isn’t any question of our right to set forth by affidavits the [12] facts as we have set them forth. Now, whether those facts—

The Court: In many affidavits it is a very silly fiction. There are some corporations that come into this court and invoke the jurisdiction of this court who do 99.44 per cent of their business in the State of California. There are corporations which are organized under the laws of some states and probably do not do \$10.00 worth of business under the laws of that state, but they invoke the diversity jurisdiction of this court, and the Supreme Court of the United States has said they may do so and I am bound by that precedent. If you have any authorities to go behind the fact of incorporation, I will be glad to entertain them.

Mr. Arditto: You still have the fundamental principle, as I understand it, and supported by the cases that we have cited in our memorandum in support of our motion to dismiss, to the effect that where the State Court acquires jurisdiction of the subject matter of the action in an action in rem prior to the time that the Federal Court has acquired jurisdiction, that the State Court’s jurisdiction is paramount. I mean, fundamentally, nothing can be decided in this case that can’t be decided in the State Court, and that is the reason for the rule.

The Court: Yes; and that would be true in most cases, would it not, but this plaintiff says, “I am a citizen of another state; the Constitution says that I am not required [13] to litigate my controversies with a citizen

of California in the courts of California; I am entitled to litigate them in the Federal Court."

Mr. Arditto: Well, we are in this position: In the State Court and in this court, among other issues that will be determined, assuming this court continues in its jurisdiction as well as the State Court, will be a decision relating to whether this is, in fact, as between these parties a corporation or not, or whether it is a mere fiction through which Mr. Shipp carries on his business.

The Court: That may all well come to pass upon a trial of the merits. Do you have anything further to add with respect to this motion?

Mr. Arditto: Not a thing.

The Court: Do you have anything in addition to what is pointed out in your authorities, Mr. Schaefer?

Mr. Schaefer: I want to point out one additional fact, your Honor. As your Honor stated, this is an action of the Metropolitan Finance against Ellsworth Wood and Elaine Shipp, and the State Court action is Mr. Shipp against Mrs. Shipp. The answer filed in this action by Ellsworth Wood, who is the brother of Elaine Shipp, the verified answer, claims that he is the owner of the car. He is not a party to the State action.

The Court: Well, that would not matter, would it, if [14] the State action could be construed to be one in rem?

Mr. Schaefer: But the Metropolitan Finance Corporation is not a party to that action and has filed an opposition here to set forth in exhibit form all the documents concerning this car, showing the original payment some two years ago by its check—your Honor has my position there—shows the receipt issued in its name and, for the purpose of this motion, the affidavit must be taken as true.

They have set forth the ownership in the car, a complete chain of title.

The only allegation in the answer of Elaine Shipp is to the effect that it was put into the name of that corporation for the purpose of evading taxes.

I have a recent authority I would like to cite to your Honor on that.

The Court: There is no need of considering that at this point, is there?

Mr. Schaefer: Very well, your Honor.

The Court: The question here is purely a jurisdictional one, and it seems to me it involves two points: One, is the State Court action an action in rem involving this automobile? Two, is whether this court, upon motion to dismiss for the want of jurisdiction, may look behind the corporate entity to determine whether the corporation is in fact the alter ego of the citizen different from the state under the laws of which it was chartered. [15]

Mr. Schaefer: As I see it, the court would adjudicate the rights of the plaintiff and this corporation unless plaintiff is a party to that state court action.

The Court: Of course it could if the plaintiff is the alter ego of one of the parties.

Mr. Schaefer: That is not alleged in this action.

The Court: Have you looked into the question of whether or not this court can inquire as to whether or not there is separate corporate entity upon a challenge to the diversity of jurisdiction here?

Mr. Schaefer: As to this phase of it, your Honor, we have set forth in an affidavit the ownership of Mr. Shipp, having 4,000 shares in a total of some 25,000 shares; and for the purposes of this motion I believe that affidavit has to be considered as correct. So I do not see there

is even a question of diversity raised or a question of alter ego raised.

The Court: I will submit the matter, gentlemen. I am very favorably inclined to resolving this fiction which enables a corporation to do 99 per cent of its business in the state and yet escape the burden of the duty of submitting its controversy to adjudication in the courts of the state. They come in here and get the benefit of the Government paying the jury fees in jury cases; they get the benefit of the unanimous verdict, as against a verdict of nine in [16] the State Court; they come here and get the benefit of the rule which prohibits this court from ordering a remittur rather than a new trial in cases where damages are deemed excessive, but I am bound by precedent.

I will submit the matter.

Mr. Schaefer: I have two cases I would like to submit, your Honor, on the point that you have stated: *Relley v. Campbell*, 134 Cal. 175; and *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210.

The Court: What do those have to do with the nature of the proceeding in the State Court?

Mr. Schaefer: They have to do with the fact that it must be not only alleged, but until the facts appear by proof in a trial—

The Court: I want to understand you.

Mr. Schaefer: —it must be established by evidence in a trial as to the overthrow of the corporate entity and the alter ego of the person, and not by affidavit.

The Court: Anything further, gentlemen?

Mr. Arditto: If I may just take about another minute of the court's time. As long as the court is going to submit this matter, I would like to submit a brief statement

or a brief memorandum on this question of whether the state action is an action in rem. I think that is so clear that I am surprised that counsel for the plaintiff does not stipulate [17] to that, but as long as he does not, I would like to brief it for the benefit of the court.

In regard to Ellsworth Wood's interest in this thing, the pleading is clear that he has only a remainder interest; in other words, that Mrs. Shipp is the owner of this car during her life.

May I have five or 10 days?

The Court: Three days?

Mr. Arditto: All right.

Mr. Schaefer: May I have a like amount to answer?

The Court: I will submit the motion upon the memoranda of both sides which may be filed within three days concurrently.

[Endorsed]: Filed Jul. 13, 1948. Edmund L. Smith, Clerk. [18]

[Endorsed]: No. 12003. United States Circuit Court of Appeals for the Ninth Circuit. The Metropolitan Finance Corporation of California, a corporation, Appellant, vs. Ellsworth Wood and Elaine Shipp, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 31, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12003

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD, ELAINE SHIPP, JOHN
DOE and RICHARD ROE,

Appellees.

POINTS AND DESIGNATION OF TRANSCRIPT
UNDER RULE 19, SUBDIVISION 6

Pursuant to Rule 19, subdivision 6, the Appellant hereby makes its statement of points relied upon and designation of the portion of transcript to be printed in support of such points.

POINT I

The Judgment of the Court in dismissing the action on the grounds that the District Court lacked jurisdiction of the subject matter is not sustained by the law.

Portions of the transcript designated to be printed:

* * * * *

Dated: August 19, 1948.

MACFARLANE, SCHAEFER & HAUN
HENRY SCHAEFER, JR.

DEXTER D. JONES
WILLIAM GAMBLE

By William Gamble

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 20, 1948. Paul P. O'Brien,
Clerk.

No. 12003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD and ELAINE SHIPP,

Appellees.

APPELLANT'S BRIEF.

MACFARLANE, SCHAEFER & HAUN,
HENRY SCHAEFER, JR.,
DEXTER D. JONES,
WILLIAM GAMBLE,

1150 Subway Terminal Building, Los Angeles 13,

Attorneys for Appellant.

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No. 12003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD and ELAINE SHIPP,

Appellees.

APPELLANT'S BRIEF.

Opinion Below.

Neither the order of the District Court [R. 78-81] nor the Judgment of Dismissal [R. 81-82] is published.

Jurisdiction.

This action was filed by the appellant, a corporation organized and existing under and by virtue of the laws of the State of Delaware, against the appellees, who are all residents and citizens of the State of California. The action is in replevin to recover an automobile over the value of three thousand dollars (\$3,000.00). Jurisdiction was acquired by the District Court because of the diversity of citizenship between the appellant and appellees. In accordance with Section 24(1) of the Judicial Code (28 U. S. C. A. Section 41(1)), as it existed at the time of

the filing of the complaint, to wit: April 14, 1948 [R. 2, 3 and 4].

This Court has jurisdiction upon appeal to review the order and the judgment of the District Court under the provisions of Section 128(a) of the Judicial Code, as amended. Title 28, U. S. C. A., Section 225.

Notice of Motion to Dismiss was filed May 7, 1948 [R. 9] and after hearing on June 7, 1948 [R. 85-98] and oral argument being made by both sides [R. 85-98], the Court made its order that the motion of the defendants to dismiss the action be granted [R. 78-81]. Thereafter on the 22nd day of June, 1948, the Court made its Judgment of Dismissal and the same was filed on June 23, 1948 [R. 81-82]. Within the time prescribed by Rule 73 of the Federal Rules of Civil Procedure, Notice of Appeal was filed [R. 82].

Statement.

The Complaint [R. 2-4] states a cause of action against the appellees for claim and delivery under the California Code of Civil Procedure, Sections 509-521. The plaintiff alleged that it was the owner and entitled to the possession of a 1947 Cadillac Sedan of the value of four thousand dollars (\$4,000.00); that possession of the said personal property was in the appellees and that they unlawfully claimed the right thereto; that demand had been made of the appellees for possession and the same had been refused. The provisional remedy of claim and delivery under the California statute (Code of Civil Procedure, Sections 509-521), was invoked and the United

States Marshal seized the automobile. After five (5) days, the appellees not having filed a written undertaking with the Marshal as is provided in Section 514 of the Code of Civil Procedure, the Marshal delivered the automobile to the appellant. Thereafter, to wit: on May 4, 1948, the appellee, Ellsworth Wood, filed his answer alleging that he was the owner of the said automobile and entitled to the possession thereof [R. 5-6]. On the same day, to wit: May 4, 1948, the appellee, Elaine Shipp, filed her answer alleging that she was the owner of the said automobile and entitled to the possession thereof [R. 7-9]. On May 17, 1948, there was filed on behalf of the appellees a Notice of Motion to Remand or Dismiss Action [R. 9] and concurrently therewith appellees filed a written Motion to Remand Cause to Superior Court in and for the County of Los Angeles, State of California, or to Dismiss Cause [R. 10-11]. Said motion was based on the grounds that the District Court was without jurisdiction by reason of the fact that appellee, Elaine Shipp, had filed an Answer and Cross-Complaint in an action No. D-356,410 in the Superior Court in and for the County of Los Angeles, State of California, wherein she had alleged that the Cadillac automobile which was the automobile sought to be recovered in this action filed in the District Court, was the community property of Everett S. Shipp and Elaine Shipp, husband and wife, and in said action of the Superior Court, the Court had issued an order restraining and enjoining Everett S. Shipp from interfering with Elaine Shipp's use of the said automobile, and that the action in

the Superior Court was an action *in rem* for the determination of the interest of the husband and wife in the specific *res*, to wit: the Cadillac automobile. That said Superior Court action having been filed prior to the filing of the complaint in the District Court for replevin, the Superior Court in and for the County of Los Angeles, State of California, had prior jurisdiction of the *res*, and the District Court should therefore dismiss the action. That on June 1, 1948, the appellant filed a Statement of Reasons and Opposition to Defendant's Motion to Remand Cause to Superior Court [R. 40-52]. The grounds of the opposition were that the action pending in the Superior Court in and for the County of Los Angeles was between Everett S. Shipp as plaintiff and Elaine Shipp as defendant, and that the appellant, Metropolitan Finance Corporation of California, a Delaware corporation, was not a party to that action and that as between Metropolitan Finance Corporation of California as plaintiff and Ellsworth Wood and Elaine Shipp as defendants, the District Court of the United States had jurisdiction to determine the title to the property which is the subject of this action. That on June 7, 1948, the matter was argued before the Honorable William C. Mathes [R. 85-98] and on June 17, 1948, the Honorable William C. Mathes made his Order on Motion of Defendants to Dismiss the Action [R. 78-81]. Said order was based on the grounds that the District Court lacked jurisdiction of the subject matter of the action and pursuant to said order on motion, a Judgment of Dismissal was entered June 23, 1948 [R. 81].

Question Presented.

Whether the Federal District Court can properly dismiss an action of which it has jurisdiction of the parties and the subject matter, against a party seeking to recover the possession of an automobile on the grounds that a prior action in the State Court has been commenced involving the same property, when the State Court action is an action for divorce and for division of community property, and the plaintiff in the action in the Federal Court is not a party to the action in the State Court, and said plaintiff claims that the said automobile was at all times the property of said plaintiff, Metropolitan Finance Corporation of California and was at all times entitled to the possession thereof.

Summary of Argument.

The Cross-Complaint filed by Mrs. Shipp in the Superior Court of California in and for the County of Los Angeles [R. 20-26], in which she alleged the property here in question to be the community property of the spouses and as to which an injunction was issued [R. 27], did not give the said Superior Court exclusive jurisdiction over such property. The jurisdiction of the State Court in an action for divorce extends only to the separate property of the spouses or to the community property. There is no jurisdiction in such Court over the property of third persons not made a party to the divorce action. Thus, in this instance the only property over which it is possible that the State Court had achieved "constructive

possession" is the property that belonged to the spouses or either of them and as to which issues were raised by the pleadings. Without an allegation that the third party has an interest in the property, the State Court cannot act in regard to such property so as to defeat the rights of the third party.

In order for the jurisdiction of the State Court to be exclusive it must be shown that the action in the Federal Court will interfere with the State Court's possession of the property, such possession being essential to the action in the State Court. Possession of the property is not essential to "divide" the interests of the spouses in property alleged to be community property. In this action judgment by the Federal Court would not interfere with the action in the State Court which is for a "division" of the community property and not for a recovery of possession of such property.

There having been no issue of the corporate entity raised in the Superior Court and no allegation of fraud in the Federal Court the plaintiff herein must be regarded as a separate entity and not as the *alter ego* of Mr. Shipp.

ARGUMENT.

I.

The State Court in a Divorce Action Does Not Acquire Exclusive Jurisdiction Over Property of the Spouses Which Would Preclude the Federal Court From Determining Rights Therein Claimed by Third Parties Not Joined in the State Court.

In order to determine whether the District Court properly dismissed the action of the appellant, it is necessary to inquire into the nature of the jurisdiction of the Superior Court of the State of California in an action for divorce in which the appellee, Elaine Shipp, was a party defendant and who in the allegation of her Answer and Cross-Complaint alleged that the property which is the subject of the present action was the community property of herself and Everett S. Shipp. In the divorce action no parties were joined other than the husband and wife as plaintiff and defendant, respectively. Neither the appellant, Metropolitan Finance Corporation of California nor appellee Ellsworth Wood were joined as parties in said action and did not intervene therein. Everett S. Shipp, the plaintiff and cross-defendant in the divorce action was not and has never been a party to the proceeding before the District Court.

It is undoubtedly true that an action for divorce, in so far as it relates to the status of the parties, is an action *in rem*, the marital relation being considered as the *res*.

DeLaMontanya v. DeLaMontanya, 112 Cal. 101, 44 Pac. 345 (1896);

Estate of Lee, 200 Cal. 310, 253 Pac. 145 (1927);

Borg v. Borg, 25 Cal. App. 2d 25, 76 P. 2d 218 (1938).

It is clear from an analysis of these cases that an action for divorce cannot be classified purely as an action *in rem*. Thus in so far as the action relates to such matters as alimony, costs and attorney's fees it is strictly an action *in personam*.

Matter of McMullin, 164 Cal. 504, 129 Pac. 773 (1912);

DeLaMontanya v. DeLaMontanya, 112 Cal. 101, 44 Pac. 345 (1896) .

The limitation of the jurisdiction of the State Court in a divorce action with respect to property is to determine the status of such property either as community property or as separate property of one of the spouses. Such an action has not been declared to be an action *in rem* and the courts have declared that the determination of the status of property as between the spouses in a divorce action can in no way affect the interest of third parties in such property.

Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442 (1888);

Elms v. Elms, 4 Cal. 2d 681, 52 P. 2d 223 (1935);

Callnon v. Callnon, 7 Cal. App. 2d 676, 46 P. 2d 988 (1935).

In the case of *Cummings v. Cummings*, 75 Cal. 434, 17 Pac. 442 (1888), the trial court, in an action for divorce, partitioned certain real property held to be community property of the spouses which was in the possession of a

third party mortgagee. In decreeing a partition of the property, the trial court held that the mortgagee could look to the wife's share for only one-half of the mortgage debt. The Supreme Court reversed said judgment and stated that the trial court was not justified in attempting to limit or change the liabilities created by the mortgage or in altering in any way the mortgagee's rights or the obligations of the community under the contract. It may be further noted that the decision of the court expressly limited the plaintiff to relief consistent with the complaint. In the divorce action between appellee Elaine Shipp and her husband, there was no issue framed as to the ownership of the automobile except as between the spouses.

In *Callnon v. Callnon*, 7 Cal. App. 2d 676, 46 P. 2d 988 (1935), the court pointed out that in a divorce action jurisdiction as to property is obtained only over the rights of parties who are before the court in the case. At page 681 the court states:

“From the foregoing, and from the authorities which we will hereafter cite, it may be taken as settled that the jurisdiction of the court in a divorce proceeding over property rights is limited to the property which belongs to the community or which is the separate property of the spouses. This jurisdiction is found in sections 141 *et seq.* of the Civil Code which authorize the *division* of the community property and a lien upon the separate property of the husband in aid of the enforcement of remedial orders made in the proceeding. . . . Hence, unless the pleadings in divorce allege that a third party claims

an interest in the community property or holds separate property in fraud of one of the spouses, the court is without jurisdiction in the divorce proceeding to determine the property rights of the third party.”

The District Court in the instant case states in its order to dismiss the action [R. 78-79] that the proceedings for divorce give the Court jurisdiction to hear and determine matters relating to the status of property alleged to be community property and that the Court necessarily assumes control of the property in controversy. Citing *Huber v. Huber*, 27 Cal. 2d 784, 167 P. 2d 708 (1946); *Salveter v. Salveter*, 206 Cal. 657, 275 Pac. 801 (1929).

Both of these cases relate to the power of the court in an action for divorce to declare the status of the property whether community or separate as between the spouses. Neither of these cases, however, can be cited as authority for the proposition that the court assumes control of the property except for the limited purpose of determining the respective interests of the parties.

In *Salveter v. Salveter*, 206 Cal. 657, 275 Pac. 801 (1929), at 660, the court states:

“In an action for divorce between two discordant spouses the trial court, upon proper averments and under the express provisions of those sections of the Civil Code (secs. 82-148), regulating actions for divorce, *is invested with full power to determine the status of the property of both or each of the spouses, regardless of the name of either in which the title to such property stands, * * **” (Emphasis added.)

It can readily be seen that there was no question as to the powers of the court other than as they related to the parties before the court.

In this action the automobile was registered in the name of the plaintiff, Metropolitan Finance Corporation, as both legal and registered owner. This plaintiff was not made a party to the divorce action. Inasmuch as the divorce court was limited in its jurisdiction to determine the rights of the parties then before it for the purpose of declaring their community or separate interests in said property and as such declaration could not affect the rights of any person not joined in said action, it is difficult to see wherein the divorce court had assumed such control of the property as would prevent this court or any other court from determining the title, interest or possession of said property in a party not joined in the divorce action. It is clear from the cases cited that the jurisdiction of the divorce court over the property of the spouses is a very limited jurisdiction for the purpose only of determining the rights and obligations of the community in such property and the court cannot deprive a third party from seeking a determination of his property rights in a second action.

II.

In an Action for Divorce the Court Does Not Acquire Such Possession or Control of the Property as to Divest a Federal Court From Determining Rights With Respect Thereto Involving Parties Not Joined in the Divorce Action.

In an action for divorce possession by the State court in order to "divide" the community property is not essential. This is illustrated by the fact that the rights of a third party who was not made a party to the action are not affected by the decree of the divorce court. The court can decree the interest, if any, of the spouses in the property without the necessity of possession.

Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442 (1888).

The mere filing of the action for divorce does not bring the property of the parties into the custody of the court.

Lord v. Hough, 43 Cal. 581 (1872);

Sun Insurance Company v. White, 123 Cal. 196, 55 Pac. 902 (1898).

Lord v. Hough at page 585, and quoted in *Sun Insurance Company v. White* at page 200, states:

"The pendency of proceedings for divorce does not of itself interrupt the exercise of the husband's powers. The property does not come into the custody of the court by the institution of the suit. The husband has still the control of it, and full power of disposition of it. He is held to equal good faith in all transactions relating to it as before the commencement of the suit. He is subject to the same restrictions in its disposal. He cannot make a voluntary conveyance of any portion of the property, with the

intent to deprive the wife of her claim in anticipation of divorce, any more than he could make such fraudulent disposition in anticipation of her widowhood.”

Nor does the issuance of an injunction against the husband to prevent his interference with the use of the property by the wife have the effect of drawing the property into the custody of the court. It is the rule in California that an injunction operates strictly *in personam*.

Berger v. Superior Court, 175 Cal. 719, 167 Pac. 143, 15 A. L. R. 373 (1917).

Further, a court in a divorce proceeding has jurisdiction to adjudicate and dispose of the property rights of the parties in real property outside of the jurisdiction of the court where such property was put in issue by the pleadings.

Spahn v. Spahn, 70 Cal. App. 2d 791, 152 Pac. 253 (1945).

It is clear that if possession were necessary for the State court to give an effective decree as to the status of the property it could give no decree effecting the status of foreign real property.

In order to divest a Federal Court of jurisdiction to determine the matter presented in this controversy it must be shown that the action in the Federal Court will interfere with the possession of the property of the State court and that such possession in the State court was essential to the effective disposition of that court's action. Conflict of jurisdiction as to the subject matter of the litigation which would defeat a second action over the same subject matter does not mean merely that the two suits relate to the same physical property or that either court had actual

or constructive possession thereof. It means that the issues involved, relief prayed for and the parties to the two suits are "so substantially alike that *lis pendens* of the last brought is included in the first."

Empire Trust Co. v. Brooks, 232 Fed. 641 at page 648 (1916).

Throughout the cases relating to conflicting jurisdiction of State and Federal Court it is clear that in order to have the State court action bar the Federal action, possession of the subject matter in the State court must be maintained by that Court only where such is essential to give effect to their judgment.

McClellan v. Carland, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762 (1909);

Pacific Live Stock Company v. Lewis, 241 U. S. 440 (1915), 60 L. Ed. 1084;

Harkin v. Brundage, 276 U. S. 36, 48 S. Ct. 268, 72 L. Ed. 457 (1928);

Empire Trust Co. v. Brooks, 232 Fed. 641 (1916);

Boynton v. Moffat Tunnel Improvement District, 57 F. 2d 772.

In the last cited case at page 779, it is stated:

"The rule that as between two actions *quasi in rem* the one first filed excludes the latter one is *subject to an important and well settled qualification, to wit, that the two actions shall invoke the same jurisdiction*. This qualification is essential to the administration of justice; except for it, a stockholder could apply for a receiver and either indefinitely postpone relief to creditors or bond holders, or could require them to come to the court of the stockholder's selection." (Emphasis added.)

If the filing of an action for divorce in which an injunction is issued against a husband preventing his interference with the wife's possession of certain properties were sufficient to bar all subsequent actions by persons not made a party to the divorce action, it would seem that a party to the divorce action could effectively tie up property of any third party whether the community had an interest in said property or not. Thus the effect of the dismissal by the District Court is to require the appellant to withhold any action for the possession of its property until a final determination has been made of the property rights in the divorce action. It is difficult to see any distinction between the instant case and that in which a piece of realty is purchased by a third party holding the legal title and in which neither the husband nor wife had an interest except that the wife held possession adversely. In this example the true owner would surely not be barred from bringing an action for ejectment until after the spouses had settled their marital differences. The nature of the two actions is entirely different in purpose and does not conflict.

The case of *Harkin v. Brundage* (276 U. S. 36, 48 S. Ct. 268, 72 L. Ed. 457 (1928)), emphasizes the point that where there is a great difference in the nature of the actions brought, there is no conflict between two jurisdictions. In that case, the Federal Court appointed a receiver in an action brought by a creditor. Prior to the filing of the bill in the Federal Court, a stockholder had filed a bill in a State Court for a receiver of the same property. Both actions were *quasi in rem* and in both cases control over the same property was necessary to effectuate any later decree. The Circuit Court of Appeals held that the two actions were so different that the Federal Court could proceed irrespective of the pendency of the State

action. Although the Supreme Court reversed the case, on other grounds, it held that the Circuit Court was correct in its holding in this respect.

The District Court in its order to dismiss [R. 78-81], relies upon the cases of *Princess Lida v. Thompson*, 305 U. S. 456 (1939); *U. S. v. Bank of N. Y. & Trust Co.*, 296 U. S. 463 (1936) and *Penn General Casualty Co. v. Penn.*, 294 U. S. 189 (1935). Those cases also recognize the proposition that the second suit is barred only where possession is necessary in the State Court and where the two suits have substantially the same purpose. Thus in *Pennsylvania General Casualty Co. v. Pennsylvania*, 294 U. S. 189, 79 L. Ed. 850 (1935), pages 855-856, it is stated:

“But if the two suits are *in rem* or *quasi in rem* requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. * * * If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property *pendente lite*, the time of acquiring actual possession may perhaps be the decisive factor.” (Emphasis added.)

The jurisdiction of the divorce court being limited to a determination of the property rights as between the parties before that court and the decree of the court with respect to the property acting only upon the interest of those parties and possession of the property by the court not being essential to effectuate its decree, the Federal Court

cannot properly divest itself of jurisdiction to hear and determine any rights with respect to such property when the issues delineated by the pleadings and the parties before the court are in all essential respects different from those presented in the divorce action.

III.

A Corporate Entity Will Be Disregarded Only Where the Facts Disclose It Is Necessary to Prevent Fraud.

The District Court upon the hearing for the motion to dismiss indicated that it was not favorably inclined to resolve the fiction with respect to corporate entity to permit a corporation doing the greater portion of its business within a State to come into the Federal Court on the basis of diversity of citizenship and to obtain the benefits allowed such corporation in the Federal Court [R. 97]. It is apparent therefore, that the District Court must have determined in granting the motion to dismiss that the appellant was not in fact a separate corporate entity but was the *alter ego* of one of its stockholders, Mr. Everett S. Shipp. If it were not the express intention of the court so to hold, the basis of the judgment of dismissal is not well founded in law as shown in points I and II of this brief.

It is a long settled rule that a corporation is regarded as a separate and distinct entity from the stockholders comprising the corporation. This is true even though the stock is all owned by one or two parties. The separate

entity of the corporation is deemed a citizen of the State of its incorporation.

Doctor v. Harrington, 196 U. S. 579, 49 L. Ed. 606, 25 S. Ct. 355 (1904);

Louisville C. & C. R. Co. v. Letson, 2 How. (U. S. 497, 11 L. Ed. 353 (1844).

A corporation as a distinct entity may be disregarded in a diversity of citizenship case only where the corporation was formed for the sole purpose of collusively attaining Federal jurisdiction.

Miller & Lux v. East Side Canal & Irrigation Co., 211 U. S. 293, 53 L. Ed. 189, 29 S. Ct. 111 (1908).

In the present case there has been no attempt made to show that the jurisdiction here invoked by the plaintiff was collusive in nature.

The only other bases for disregarding the corporate entity are where the facts show that it is necessary to disregard the entity in order to prevent fraud, protect the rights of third persons or prevent a palpable injustice.

In re Sterling, 97 F. 2d 505 (1938);

Majestic Company v. Orpheum Circuit, 21 F. 2d 720, 722 (1927);

Wenban Estate v. Hewlett, 193 Cal. 675, 227 Pac. 723 (1924);

Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673 (1921).

Citing the two last cited California cases, Mr. Fletcher in *I Cyclopedia of the Law of Corporations*, at page 142, states :

“Whether the corporation shall be disregarded depends on questions of fact, to be appropriately pleaded, and the presumptions are that the stockholders or officers and the corporation are distinct entities.”

In the present case the only allegations in the answers of defendants Ellsworth Wood [R. 5-6] and Elaine Shipp [R. 7-8], in regard to the identity of Mr. Shipp and the plaintiff corporation are that Mr. Shipp owns “at least 85% of the stock of the Metropolitan Finance Corporation of California, a corporation” and that title to the property was taken in the plaintiff corporation for tax purposes. These allegations at most would indicate that Mr. Shipp had a large and controlling interest in the corporation. Whether he is the sole stockholder or there are many stockholders is not the controlling factor as to whether or not a corporate entity should be disregarded.

Majestic Company v. Orpheum Circuit, 21 F. 2d 720, 722 (1927) ;

Erkenbrecher v. Grant, 187 Cal. 7, 200 Pac. 641 (1927).

There is no allegation in the answer nor in the affidavit set forth on the motion to dismiss which alleges that any fraud or injustice would be imposed upon any party to this action should the corporate entity not be disregarded. The only purpose for disregarding the corporate entity was to divest the Federal Court of jurisdiction to hear and determine this matter. As has been shown by the decisions with respect to this proposition of law the corporate entity

will not be disregarded unless upon a proper showing of facts upon a trial of the merits of the cause it is shown that to indulge in the corporate fiction would be prejudicial to the interest of one of the parties to such an extent as to amount to fraud or a palpable injustice.

Conclusion.

The judgment of dismissal should be reversed and the case remanded to the District Court for trial on the merits.

Respectfully submitted,

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No. 12003

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FORNIA, a corporation,

Appellant,

vs.

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WOOD as Executor of the Estate of ELAINE SHIPP,
Deceased,

Appellees.

APPELLEES' BRIEF.

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DEC 1 1948

PAUL P. O'BRIEN,

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Appellees.

REPLY BRIEF OF APPELLEES.

Foreword.

Elaine Shipp (one of the original defendants herein) died on July 27, 1948, and by stipulation of the parties hereto this Court, on November 3, 1948, ordered that Ellsworth Wood, in his capacity as Executor of the Estate of Elaine Shipp, Deceased, be substituted as an appellee herein in the place and stead of said Elaine Shipp.

Upon the death of Elaine Shipp on July 27, 1948, her life interest in the Cadillac automobile, in question herein, terminated and the only party (other than appellant and Everett S. Shipp) presently interested in this litigation is Ellsworth Wood—in his *individual* capacity [R. 6].

The Estate of *Elaine Shipp, Deceased*, has no claim to or interest in the subject matter of this appeal.

Ellsworth Wood, *individually*, is, in effect, the only appellee herein and he claims his interest because Elaine Shipp gave him the automobile subject to her life interest [R. 6]. Ellsworth Wood was, at all times pertinent herein, and now is a resident of Portland, Oregon, and appellant is incorporated in the State of Delaware. Elaine Shipp was a resident of the County of Los Angeles, State of California. Ellsworth Wood was not served in the Southern District of California.

Other than to point out the above facts we have no statement to make in regard to the jurisdictional references contained in appellant's opening brief.

Statement.

The record [R. 12, 17-19] discloses that Everett S. Shipp filed a complaint for divorce against Elaine Shipp (now deceased) on March 4, 1948, in the Superior Court of the State of California, in and for the County of Los Angeles (hereinafter called State Court). That on March 8, 1948, Elaine Shipp filed an answer and cross-complaint to that complaint [R. 12, 20-26] and on June 4, 1948, she filed an amended answer and an amended cross-complaint to such complaint [R. 56, 59-78]. The answers and cross-complaints *raised an issue, inter alia, as to the ownership of the Cadillac automobile in question herein* [R. 22, 65, 77], *and as to Everett S. Shipp's interest in the appellant herein* [R. 22, 60, 62, 63, 64, 65, 70, 72, 73, 74, 75].

On March 9, 1948, State Court enjoined Everett S. Shipp from interfering with Elaine Shipp's use of the Cadillac automobile [R. 27].

On April 14, 1948 (41 days *after* State Court action instituted) appellant filed an action in the District Court of the United States for the Southern District of California, Central Division (hereinafter called District Court) against Elaine Shipp and Ellsworth Wood for recovery of this automobile—the title to and right to possession of which was already placed in issue by State Court action [R. 2-4].

On May 4, 1948, Elaine Shipp and Ellsworth Wood filed their answers in District Court [R. 5-9]. These answers set up a life interest in the automobile in Elaine Shipp and a remainder interest in Ellsworth Wood [R. 6-7].

On May 17, 1948, appellee filed a Notice of Motion to Dismiss action with District Court [R. 9-11]. The motion, in brief, was based upon the theory that State Court had first acquired jurisdiction over and constructive possession of the Cadillac automobile and that the issue in both actions ((*i. e.*) District Court and State Court) was the same (*i. e.*) who was the owner of the automobile (*i. e.*) Elaine or Everett S. Shipp (through his alter ego—appellant herein) and, therefore, District Court did not have jurisdiction over the litigation [R. 10-16].

On June 1, 1948, appellant filed a statement of Reasons and Opposition to Defendant's Motion to Remand Cause to Superior Court [R. 40-52].

Everett S. Shipp's interest in appellant and other related corporations are set forth in Exhibit E of the affidavit in Support of Motion to Dismiss [R. 39] and in the Supplemental Affidavit in support of that motion [R. 57-58]. These affidavits disclose that Everett S. Shipp owns about 81% of appellant's stock.

The circumstances surrounding the commencement of this action in District Court and Everett S. Shipp's participation therein are disclosed by Mr. Shipp's deposition [R. 13-15] and the affidavits of appellee's attorney [R. 16, 58].

On June 7, 1948, the matter was argued in District Court [R. 85-98] and on June 17, 1947, an order of dismissal was made [R. 78-81] on the ground District Court lacked jurisdiction of the subject matter of the action. A judgment of Dismissal was entered June 23, 1948 [R. 81]. The present appeal was then timely filed.

Question Presented.

Did the District Court err in deciding that State Court held prior constructive possession of the Cadillac automobile in a *quasi in rem* proceeding and therefore, the District Court did not have jurisdiction to hear and determine a controversy involving possessory rights in the same automobile where the effective disposition of the such action would result in interference with the administration of the *res* by State Court?

Summary of Argument.

In California Courts title to separate or community property of the spouses can be quieted in a divorce action if the pleadings raise that issue. The pleadings in State Court did raise that issue in this case.

The pleadings in State Court also raised an issue in regard to appellant's status and interest in the subject matter of this action.

State Court necessarily assumed control of the subject matter of this action *in the quasi in rem* proceeding commenced in that Court about forty days prior to the commencement of another *in rem* proceeding in District Court involving possessory rights to the same *res and affecting the same parties*.

District Court does not have jurisdiction to hear and determine an issue involving possessory rights in the same *res* which is the subject matter of a prior *in rem* action in State Court where the issues are the same and the same parties would be affected by a judgment of either Court.

District Court was not required to nor did it disregard the alleged separate corporate entity of appellant.

ARGUMENT.

I.

In Proceedings for Divorce, Under the Laws of California, State Court Has Jurisdiction to Hear and Determine the Property Rights of the Litigating Spouses.

It is well settled that California Courts have the power, when the issue is presented by the pleadings in a divorce action, to hear and determine the property rights of husband and wife and to quiet title (to the separate and community property) in the rightful owner.

In *Huber v. Huber*, 27 Cal. 2d 784, 793, 167 P. 2d 708, the Court said:

“* * * While the court in a divorce action should not ‘assign the *separate* property of one of the spouses to the other’ * * * yet when the issue has been made the court may determine whether the property is separate or community and *quiet title in the rightful owner*. *Salveter v. Salveter*, 206 Cal. 657 (275 Pac. 801); *Allen v. Allen*, 159 Cal. 197 (113 Pac. 160); *Spahn v. Spahn*, 70 Cal. App. 2nd, 791 (162 Pac. (2nd) 53); Here the pleadings put in issue the status of the property and the rights of the parties therein both separate and community.” (Emphasis added.)

In *Spahn v. Spahn*, 70 Cal. App. 2d 791, 796, 797, 162 P. 2d 53, the Court said:

“In the case of *Callnon v. Callnon*, 7 Cal. App. 2d 676, 670, (46 P. 2d 988), cited by both parties, the court held: ‘Where the property rights are put in issue in a divorce proceeding, *either by specific allegations describing such property*, or by allegation that

no community property existed, the decree is *res judicata* of such rights.' In the same case at page 681 the rule is stated as follows: 'It may be taken as settled that the jurisdiction of the court in a divorce proceeding over property rights is limited to the property which belongs to the community or *which is the separate property of the spouses*. This jurisdiction is found in sections 141 *et seq.* of the Civil Code, which authorize the division of the community property and a lien upon the separate property of the husband in aid of the enforcement of remedial orders made in the proceeding.' (Italics added.)

"The rule which seems applicable in the present situation is explicitly stated in 27 Corpus Juris Secundum, page 1141:

" 'Where a party to a divorce invokes the action of the trial court in the determination of property rights, as by submitting the pleadings and proof, such party cannot complain on appeal that the court has no authority to determine those rights.'

"The above rule finds support in the California cases. In *Allen v. Allen*, 159 Cal. 197, 201 (113 P. 160) it was said:

" 'But the superior court in which the action for divorce must be brought is also invested with general jurisdiction to determine title to real property, whether based on legal or equitable claims, and if the parties in a divorce proceeding see fit to make the character of property held by them—*whether separate or community*—an issue in the proceeding, as the court is vested with jurisdiction to *determine that question as fully as if the title were put in issue in a direct action for that purpose, the same effect must be given to its judgment as if such an action had in fact been brought*. While it was not necessary that the question

* * * should have been an issue in the divorce proceeding between these parties they nevertheless did make it such. Neither party objected to doing so, but both invited it.' Likewise in *Marshall v. Marshall*, 138 Cal. App. 706, 707 (33 P. 2d 416), the court said: 'The issue as to the property having been fairly made and by both parties submitted to the court for determination, *the court had jurisdiction to determine the question involved as to the character of the property and to quiet the title of the rightful owner thereto.*' A like holding is found in *Roy v. Roy*, 29 Cal. App. 2d, 596, 603 (85 P. 2d 223)." (Emphasis added.)

The argument of appellant (pp. 7-11) is based upon the erroneous assumption that Mrs. Shipp was claiming (in State Court) that the Cadillac automobile was part of the community property of the spouses and that appellant was not concerned with State Court action. On the contrary the record herein discloses:

- (a) That Elaine Shipp claimed the automobile as her separate property [R. 5, 6, 7, 15, 65, 77] and placed this matter in issue before State Court;
- (b) That Elaine Shipp claimed (and placed in issue before State Court) that appellant herein was one of many mere fictions and devices through which Everett S. Shipp does business [R. 8, 16, 56-59, 62-65, 72-75];
- (c) That Elaine Shipp claimed that appellant was named as owner of the automobile pursuant to an agreement between herself and Everett S. Shipp [R. 5-6, 7-8].

The argument of appellant [R. 7-11] completely ignores the fact that State Court could not have decided the *quasi in rem* proceeding before it without deciding appellant's status in regard to and interest in the Cadillac automobile in question herein. District Court did not have presented, for its consideration, one single issue that had not been previously presented to State Court.

II.

State Court Necessarily Assumed Control of the Subject Matter of This Action.

The amended answer and amended cross-complaint in State Court raised the issue that the Cadillac automobile was the *separate property* of Elaine Shipp [R. 65, 77] after the original answer and cross-complaint alleged the property was community property of the parties [R. 22].

On March 9, State Court enjoined Everett S. Shipp from "interfering with (Elaine Shipp's) her use of the Cadillac" [R. 27].

The State Court could not "quiet title" in Elaine Shipp unless it assumed control of the "thing" to which title was to be "quieted."

Appellant attempts to avoid this obvious principle relied upon by District Court [R. 79] by citing and quoting from three California cases (App. Op. Br. pp. 8-10) which refer to another well established rule to the effect that the pleadings in a divorce action, in California, must frame an issue relating to a third party's claim before the Courts, in such action, will pass on the interest of such party in property claimed by one or both of the spouses.

However, appellant has entirely overlooked appellee's contention that the alleged "third party" (*i. e.* appellant)

is a mere fiction and device through which Everett S. Shipp transacts business [R. 62-65, 72-75].

Those cases cited by appellant deal with interests of disinterested and actual third parties as distinguished from appellant—the actual existence of which was placed in issue by the pleadings in the action in State Court.

In other words the interest of appellant (in the subject matter of this action) was placed in issue before State Court by the allegations relating to disregard of separate entity of appellant herein.

Again appellee points out that District Court did not have presented to it one issue that was not presented to State Court.

In *Boston Acme Mines Corp. v. Salina Canyon Coal Co.*, 3 F. 3d 729, 733, the Court recognized that, in a quiet title action, the Court assumes control and constructive possession of *res* to a sufficient degree to warrant the application of the well established rule that, as between the State and Federal Court, the one which first acquires jurisdiction by possession of the property is vested with power to hear and determine all controversies in respect thereof in an *in rem* Action.

See:

Penn. General Casualty Co. v. Pennsylvania, 294
U. S. 189;

United States v. Bank of N. Y. & Trust Co., 296
U. S. 463.

It is well established in California Courts that an action such as was commenced in State Court herein is, in effect, an action to quiet title and therefore an *in rem* Action.

Huber v. Huber, 27 Cal. 2d 784, 793, 167 P. 2d 708;

Spahn v. Spahn, 70 Cal. App. 2d 791, 797, 796, 162 P. 2d 53;

Pauls v. Powers, 2 Cal. 2d 590, 42 P. 2d 75;

Title Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356.

III.

Where a State Court Holds Prior Actual or Constructive Possession of Property in an *in Rem* or Quasi *in Rem* Proceedings, a Federal District Court Has No Jurisdiction to Hear and Determine a Controversy, Involving Possessory Rights in the Same Res, the Effective Disposition of Which by the Federal Court Would Result in Interference With the Administration of the Res by the State Court.

We believe we have established, by the foregoing pages, the following:

- (a) State Court had prior constructive possession of the subject matter of this action;
- (b) Such possession was in an *in rem* action;
- (c) The action, in District Court, involved possessory rights in the same *res*;
- (d) The effective disposition by Federal Court of such action would interfere with the administration of such *res* by State Court.

It is respectfully submitted that the actions in District Court and State Court presented an identical issue—*(i. e.)* Who was entitled to possession to and title in a Cadillac automobile.

Everett S. Shipp wants the State Court *and* the District Court to concurrently consider this issue.

We believe the following cases support appellees' position that State Court, having first acquired jurisdiction, is the only and proper Court to decide the issue.

Princess Lida v. Thompson, 305 U. S. 456;

U. S. v. Bank of New York & Trust Co., 296 U. S. 463;

Penn. General Casualty Company v. Pennsylvania, 294 U. S. 189;

Commonwealth Trust Co. v. Bradford, 297 U. S. 613.

In *Princess Lida v. Thompson*, 305 U. S. 456, 465, the Court said:

*"The plaintiffs in the District Court were but two of the five cestuis. One of the others has appeared in the Common Pleas proceeding and excepted to the trustees accounts. Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both * * * may proceed * * *. On the other hand, if the two suits are in rem, or quasi in rem, * * * the jurisdiction of*

the one court must yield to the other. We have said that * * * the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, * * *.” (Emphasis added.)

In this present proceeding both the State Court and District Court will be “required to cover the same ground” if this Court fails to sustain District Court. In both Courts, appellee will contend that the Cadillac is his property because Mrs. Shipp gave it to him after the car had been registered in the name of appellant for expense purposes.

It is particularly noted that in the *Princess Lida* case, *supra*, all parties interested were *not* before *both* Courts at the time the motion to dismiss was granted.

Further it is also noted that in the *Boston Acme Mines Corp* case, *supra*, the Circuit Court stressed that in addition to the fact that the parties were different in the two Courts, the *Federal action* presented “issues” that were *not* involved in the State action.

Therefore, we submit that appellant cannot even contend there is any conflict between the *Princess Lida* and *Boston Mine* cases. Of course, in case of conflict the *Princess Lida* case would control.

Along this line we call the Court’s attention to page 479 of *U. S. v. Bank of New York, etc. Co.*, 296 U. S. 463, wherein the Court said:

“* * * The State Court still had control of the property and questions as to the rights of the parties who were before it, or of those who might come before it, were legal questions which the court had jurisdiction to decide.” (Emphasis added.)

IV.

District Court Did Not and Was Not Required to Disregard Appellant's Corporate Entity to Support Its Judgment of Dismissal.

District Court did not disregard appellant's corporate entity and District Court was not required to do so in order to support its judgment herein.

That question is covered by the pleadings in State Court action [R. 62-65, 72-75] and at the trial appellee will prove those allegations by an abundance of testimony. If this Court reverses the judgment herein the identical pleadings will be alleged by appellee in an amended answer filed with District Court.

We have no quarrel with the broad general principles referred to by appellant and, in fact, appellee will bring himself within those principles at the trial of this action (in either the State or District Court). However, the judgment of District Court, is fully supported by arguments I, II, and III, *supra*, without the necessity of resolving the fiction prior to a trial on the merits. There is no language contained in the order of District Court which supports appellant's statement, at page 17 of its brief, to the effect that District Court disregarded appellant's corporate entity. On the contrary that order very clearly discloses the reasoning underlying the order and the judgment of dismissal [R. 78-83].

The District Court dismissed the action because it didn't want "to cover the same ground" ((i. e.) *Princess*

Lida v. Thompson, 305 U. S. 456, 465) which is going to be covered by State Court (which first acquired jurisdiction) in another “*in rem*” proceeding involving the same Cadillac automobile.

Conclusion.

The judgment of dismissal should be sustained.

Respectfully submitted,

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Attorneys for Appellee.

No. 12003.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD and ELAINE SHIPP,

Appellees.

APPELLANT'S REPLY BRIEF.

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PAUL P. O'BRIEN,

CLERK

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No. 12003.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD and ELAINE SHIPP,

Appellees.

APPELLANT'S REPLY BRIEF.

Foreword.

Appellant has no desire to reargue matters set forth in his opening brief, but to confine this brief to a reply to certain matters set forth in the appellees' brief.

I.

Appellee, Ellsworth Wood Individually, Is Not the Only Party Interested in This Appeal.

Appellees point out that since this litigation began the appellee, Elaine Shipp, has died, and state that the only party interested in this litigation other than the appellant is the appellee, Ellsworth Wood, in his individual capacity, and that the estate of the deceased, Elaine Shipp, has no interest in the subject matter of this appeal. (Appellees'

Br. pp. 1 and 2.) In discussing another matter, appellee, Wood, indicates that at the trial he will prove certain allegations by an abundance of testimony in either the State or District Court. (Appellees' Br. p. 14.)

We fail to see how the appellee Ellsworth Wood can make any showing in the State Court for the reasons that:

1. He is not a party to that action [R. 17, 20, 59];
2. That action has abated on the death of the wife (hereinafter further discussed);
3. Evidence cannot be offered in the action at Bar unless appellee concedes a reversal is in order.

1. That appellee Wood cannot present proof in the State Court action is apparent by the examination of the record cited as it will appear he never has been a party of that action and has no standing in that proceeding.

2. It is elemental that an action for divorce abates on the death of a party.

In re Seiler's Estate, 164 Cal. 181, 128 Pac. 334 (Ann. Cas. 1914B, 1093);

Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064;

Kellett v. Marvel, 9 Cal. App. 2d 629, 51 P. 2d 185.

3. Appellant is unable to understand how appellee Wood can offer any evidence in the pending matter unless the Judgment of Dismissal is reversed. It is, of course, the appellant's contention that the Judgment in the District Court is erroneous and should be reversed, and appellant believes that a trial on the merits is necessary to

dispose of certain issues raised by the pleadings. The appellee Ellsworth Wood in his answer [R. 5] alleges that he is the owner of the Cadillac automobile "and was at all times mentioned in the complaint and now is entitled to possession of said automobile," that his co-defendant Elaine Shipp gave said automobile to him reserving a life estate.

In the answer of Elaine Shipp [R. 7] it is alleged that she is the owner of the Cadillac automobile and entitled to the possession thereof. No mention whatever is made in this answer that her possession is limited to a life estate or that there was any transfer of said automobile made to the appellee Ellsworth Wood. A direct conflict between the answers of Ellsworth Wood and Elaine Shipp is thus raised, and without an adjudication of this issue no title or possession could be claimed by the appellee Ellsworth Wood. As appellant has pointed out, the original contract to purchase was made in the name of the appellant on November 17, 1945 [R. 44]; the consideration paid on this contract was the check of appellant [R. 48]; the statement issued by Don Lee at the time delivery was made (March 10, 1948) was issued in appellant's name [R. 49]; the check for payment was made by appellant [R. 50]; the certificate of ownership was issued to appellant [R. 51]. Presumptively, therefore, the ownership of the automobile is in the name of appellant on the records of the Motor Vehicle Department of the State of California, and before appellee Wood is entitled to possession or ownership competent evidence must be presented and a finding made thereon that he is the owner. If there is any merit to the appellees' contention, there still exists the issue between the Estate of Elaine Shipp and Ellsworth Wood as to whom is entitled to the automobile.

II.

**A Corporate Entity Will Be Disregarded Only Where
It Is Shown That Under the Particular Circum-
stances Not to Do so Would Promote Injustice or
Sanction a Fraud.**

With respect to the question of disregarding the corporate entity, we believe that that is not a matter that the Court should consider on a Motion to Dismiss, and particularly where the pleadings do not adequately set forth the necessary allegations. We do not believe that either of the appellees have in their answers [R. 5, 7] made the allegations required to put that matter in issue. The Court inquired into this phase of the matter at a hearing on the Motion to Dismiss [R. 91, 92, 93]. On page 93, the Court pointed out to counsel for appellees that the plaintiff was a foreign corporation having chosen the Federal Court by reason of diversity of citizenship. The Court stated further that he would examine any authorities that counsel for appellees wished to give him considering the principle of whether or not the plaintiff was the same as an individual citizen of California, and appellees' counsel advised the Court very frankly that he had no such authority. The Court then stated as follows [R. 93, 94, 95]:

“In other words, can this court, when a foreign corporation comes here and says it is a corporation chartered under the laws or created by the laws of a certain state and is, therefore, under the holdings of the Supreme Court, to be deemed for these purposes

a citizen of that state, may this court take testimony and say: 'Ah! But that is a fake. You are really Joe Doakes, a citizen of California'; or must the court admit for jurisdictional purposes the facts of the creation? It is all a fiction, anyhow."

* * * * *

"Mr. Arditto: You still have the fundamental principle, as I understand it, and supported by the cases that we have cited in our memorandum in support of our motion to dismiss, to the effect that where the State Court acquires jurisdiction of the subject matter of the action in an action *in rem* prior to the time that the Federal Court has acquired jurisdiction, that the State Court's jurisdiction is paramount. I mean, fundamentally, nothing can be decided in this case that can't be decided in the State Court, and that is the reason for the rule.

"The Court: Yes; and that would be true in most cases, would it not, but this plaintiff says, 'I am a citizen of another state; the Constitution says that I am not required [13] to litigate my controversies with a citizen of California in the courts of California; I am entitled to litigate them in the Federal Court.'

"Mr. Arditto: Well, we are in this position: In the State Court and in this court, among other issues that will be determined, assuming this court continues in its jurisdiction as well as the State Court, will be a decision relating to whether this is, in fact, as between these parties a corporation or not, or whether it is a mere fiction through which Mr. Shipp carries on his business.

"The Court: That may all well come to pass upon a trial of the merits. Do you have anything further to add with respect to this motion?"

We believe the Court properly stated the principles that governed him in making the determination, and are, therefore, unable to understand why the Court reversed itself and dismissed the action.

It is, of course, a fundamental matter of law that a corporation, such as the appellant organized under the laws of Delaware, when it has a controversy with a citizen of this state which controversy involves more than three thousand dollars, may elect the Federal Court as a forum in which to decide its litigation. The appellee attempts to escape this law by contending that in the State Court proceeding, which was between Mr. and Mrs. Shipp, the allegations that Mr. Shipp was the owner of such portion of the stock of five corporations, including the appellant, as to require a finding that each of these corporations was but an *alter ego* of Mr. Shipp and hence parties to the State Court action. The appellee contends that the amended cross-complaint in the State Court action [R. 59-68] sufficiently puts in issue the actual existence of the present appellant as to make it the *alter ego* of Mr. Shipp. This assumption would require the State Court to set aside the corporate entity for all purposes. However, the allegations upon which the appellee relies [R. 62-65] pertain to an alleged defrauding of Elaine Shipp of money due Mr. Shipp as salary from the various corporations. These allegations, which are mere conclusions of the pleader, in no way put in issue the title to the Cadillac automobile here in question as between Elaine Shipp and the appellant Metropolitan Finance Corporation of California. As stated in *Minifie v. Rowley*, 187 Cal. 481, 487, 202 Pac. 673, to allege facts sufficient to disregard the corporate entity it is necessary to show that "the adher-

ence to the fiction of separate existence of the corporation would, under the particular circumstances sanction a fraud or promote injustice.” The circumstances alleged in the amended cross-complaint pertained solely to the equity of Mrs. Shipp in the various corporations. It is, of course, elemental that a person’s title to property may not be determined in an action to which he is not a party. (*City of Los Angeles v. Knapp*, 22 Cal. App. 2d 211, 213, 70 P. 2d 643.) Even conceding that this were possible, the action is abated by the death of Mrs. Shipp.

III.

Jurisdiction.

Jurisdiction of the District Court was acquired on the date the complaint was filed, to-wit, April 14, 1948 [R. 4]. On that date there was on file in the State Court the original complaint filed by the appellant March 4, 1948 [R. 17], and the original cross-complaint on behalf of appellee Elaine Shipp filed March 8, 1948 [R. 20]. On May 17, 1948, appellees filed their Motion to Dismiss [R. 9, 10] which was set for hearing on June 7, 1948. On June 5, 1948, two days before the hearing, there was served on Mr. Shipp in the State Court action an amended cross-complaint [R. 59-68]. It is on the basis of facts alleged in this amended cross-complaint that the appellees contend the District Court was correct in dismissing the present action, for there was no mention in the original cross-complaint in the State Court action of the present appellant Metropolitan Finance Corporation of California.

Conclusion.

We respectfully submit that the Judgment of the District Court should be reversed and the case remanded for trial on the merits.

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No. 12,006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ORBY SMITH, JR., and WILLIAM JOSEPH MONTEZ,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLEE.

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No. 12,006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ORBY SMITH, JR., and WILLIAM JOSEPH MONTEZ,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLEE.

I.

Jurisdictional Statement.

There is no jurisdictional statement contained in appellants' opening brief. Therefore, we respectfully point out that defendants and appellants herein were convicted by a jury in the United States District Court for the Southern District of California for the violation of section 588(b), subsection (b), Title 12, United States Code; the District Court allegedly had jurisdiction under section 41(2) of the United States Code, and this court has jurisdiction under section 225(a) of Title 28, United States Code. [Indictment, Clk. Tr. R. 2; Verdict, Clk. Tr. R. 10 and 11; and Judgments, Clk. Tr. R. 12 and 14.]

The appellant Smith was sentenced to a term of imprisonment of 25 years [Clk. Tr. R. 14]. The appellant Montez was sentenced to a term of 20 years [Clk. Tr. R. 12]. Thereafter, the appellants Smith and Montez duly filed their notice of appeal from said judgment within the time prescribed by law [Clk. Tr. R. 26].

II.

Statement of the Case.

The indictment of the Federal Grand Jury upon which defendants were convicted charges them as follows:

"On or about December 4, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Joseph Orby Smith, Jr., did, by force and violence and by putting in fear, feloniously take and attempt to take from the person and presence of another namely, Paul V. Glowczewski, money belonging to, and in the care, custody, control, management and possession of a bank, namely: the Seventh and Broadway Branch of the Bank of America, National Trust and Savings Association, which Bank was then a member bank of the Federal Reserve System:

"In committing and attempting to commit the offense heretofore charged, defendant Joseph Orby Smith, Jr., did assault Paul V. Glowczewski and put in jeopardy the life of said Paul V. Glowczewski by the use of a dangerous weapon and device, namely; a .45 caliber automatic.

"The Grand Jury further charges that on or about December 4, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, Defendant William Joseph Montez did aid and abet the defendant Joseph Orby Smith Jr., in the commission of said offense." [Clk. Tr. R. 2 and 3.]

III.

Statement of Facts.

It is obvious from the reading of the appellants' opening brief that no effort has been made to set out a complete statement of facts adduced at the trial. We deem such a statement necessary to show this honorable court, first, that the substantial evidence is inconsistent with innocence and in no sense can be construed as being as consistent with innocence as with guilt; second, that evidence tending to prove other offenses was invited by the appellants and properly admitted; and third, that no objection was made at the time the evidence was admitted and in the absence of such an objection appellants cannot now complain, because even if improperly admitted the facts so without doubt support conviction that any such error could not properly be prejudicial to appellants.

Additional facts adduced at the trial are as follows:

On December 4, 1947, the Bank of America, Broadway and Seventh Street Branch, in the City of Los Angeles, was held up at approximately 3 P. M. [R. 8, 9 and 76] and the amount of money obtained by the holdup man was the sum of \$2,990.00 [R. 42]¹ in denominations of 5, 10, 20, 50 and 100-dollar bills [R. 11]. Appellant Smith was identified as the robber by the teller, Glowczewski [R. 9] and by two persons standing in line behind him at the time the bank was held up, Susan Bloom [R. 58] and Esther Martens [R. 79 and 81]. The three identifying witnesses testified that the defendant had on a beige colored raincoat [Government's Exhibit 2] which was dirty and soiled and that he wore no hat [R. 12, 60, 61 and 78], and that he needed a haircut and a shave [R. 26, 60, 61 and 78]. The

teller identified the gun [Government's Exhibit 3] used by the robber as a .45 automatic [R. 15] the muzzle of the gun was rusty, with rust marks along the left side of the barrel [R. 16].

Appellants Smith and Montez both admitted in their testimony at the time of the trial that they were in the vicinity of the bank between the hours of 1:30 [R. 224, 225, 301] and some little time after the holdup had occurred [R. 228, 309, 310 and 311], and had during that period been to an attorney's office in the immediate vicinity of the bank where they saw a man named John R. Jobe, employed by the attorney [R. 225, 226 and 304]. John R. Jobe, a Government witness, corroborated the testimony of the appellants that they came to the attorney's office on December 4 [R. 123] but placed their arrival between 3:10 and 3:20 P. M. of that day, which was shortly after the holdup [R. 124]. Jobe further testified that Smith, whom he knew as "Corie", on that day looked like he needed a haircut and shave [R. 125 and 129].

Earl Patrick, another Government witness, testified that he knew Smith and Montez [R. 43] but he knew Smith under the name of "Corie"; that he saw him about 7:30 or 8 o'clock in the afternoon of December 4th at the home of Henry Royal [R. 44] at 43rd and Crocker Streets; that Corie was sitting on a couch and Montez in a chair; that Corie showed him some money in denominations of fives, tens, and some twenties and \$100 bills and that he had a conversation with him in respect to the money [R. 45]; that in the conversation Smith told him he had to have more money and that he had about \$3,000.00 [R. 46]. He further testified that he saw Montez take a .45 automatic and put it under the cushion where he sat; and that the gun was similar to Government's Exhibit 3 [R. 47].

Howard L. Smith, a Government witness, testified that he was an officer of the Los Angeles Police Department, that he placed the defendant Montez under arrest on December 8, 1947, at 1139 North Cummings [R. 82]; that at about 11 o'clock at night he walked into the bedroom where Montez was in bed; and after Montez got out of the bed the mattress was raised and that two guns were found—one a .45 automatic [Government's Exhibit 3] and the other a .32 automatic [R. 83]; that at that time the .45 automatic had the number filed off, there was a pattern of rust on the left side of the barrel where the pit marks are, and there was rust in the barrel of the gun, in the muzzle [R. 84]; and that the gun was loaded; that the gun was turned in to the Police Crime Laboratory [R. 85]; that about two months subsequent to December 8, 1947, he again went out to the home of Montez in the company of Special Agent Hutcheson where they found Government's Exhibit 2, the raincoat, in a clothes closet in the back bedroom of Montez's home [R. 86].

Russell Camp, a Government witness, testified that he is a police officer of the City of Los Angeles and was attached to the Crime Laboratory. He recognized Government's Exhibit 3 as a gun he saw on December 10, 1947, in the Crime Laboratory of the Los Angeles Police Department which had been brought in for restoring of the number and for test firing; that in raising the numbers and test-firing the gun an acid was used; that the gun was washed and wiped off with an oily rag, and that the effect of such a cleaning process removes the loose rust. The left side of Government's Exhibit 3 had rust pit marks still apparent upon it [R. 92, 93 and 94].

Special Agent Hutcheson of the Federal Bureau of Investigation testified on behalf of the Government that he

had a conversation on January 8, 1948, with Montez [R. 97] when Montez was shown a picture of Smith and denied knowing Smith and stated he had never seen him before and had never had contact with him [R. 99]; that he had a subsequent conversation with Montez on January 12, 1948, in which Montez admitted ownership of Government's Exhibit 2, the coat, and Government's Exhibit 3, the gun [R. 100]; that Montez further stated to him at this interview that on December 4, 1947, at 1 o'clock P. M. he, Montez, had driven downtown from his home and parked his car in downtown Los Angeles on Broadway between 8th and 9th Streets; that he attended a movie at the Tower Theater, that he was all by himself and met nobody he knew [R. 101].

Both of the appellants admitted in their testimony at the time of the trial being in the vicinity of the bank at the time of the robbery [R. 224, 225, 301 and 302]; and each testified that they arrived in the downtown area at approximately 1:30 P. M. [R. 225, 301] and that they arrived at the attorney's office at 2 or 2:30 P. M. [R. 303 and 305] and left the office, and that after leaving the office they noticed a big crowd out in front of the bank [R. 227, 228 and 309]. Smith testified that he arrived home at 5:30 or a quarter to 6 [R. 229] and thereafter went on a date around 7 o'clock with one, Jack Arbuckle [R. 230]. Montez testified that he arrived home around 5 o'clock after leaving the downtown area [R. 312] and stayed home [R. 313].

Other testimony relating to the commission by the defendants of other similar offenses is omitted at this point because it will be more fully set out and dealt with later in this brief.

IV.
ARGUMENT.

I. All Substantial Evidence Clearly and Without Doubt Supports Conviction and Is in No Sense as Consistent With Innocence as With Guilt.

Appellants have failed in their argument in Point I to point out on what specific evidence they rely to invoke the well-established rule that when all substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a conviction. We agree with the principle but cannot see the application at the case at bar. The well-established rule quoted above is qualified in the cases cited by appellants in that if the evidence is convincing that the defendants are guilty then there is no reason ordinarily for the court to exercise such powers.

The evidence is corroborated, plain and convincing of the defendants' guilt. It discloses that the appellant Smith was positively identified as the holdup man by three persons—the teller [R. 9] and two disinterested witnesses who were standing in line in back of the holdup man, Bloom [R. 58] and Martens [R. 79 and 81]. Not only did they identify the person of Smith but the coat which was worn by him at the time [R. 12, 13, 61 and 76] and the gun used in the holdup [R. 15, 16, 47 and 65], and they attested to the further fact that Smith needed a haircut and a shave [R. 26, 41, 60, 61 and 78]. It is to be noted that the witness Bloom picked Smith out of a police show-up on the second occasion of seeing him [R. 60, 62] and prior to picking Smith out of a line of suspects in the show-up she picked the defendant's picture out of a dozen or two photographs [R. 65 and 66]. The teller was very careful in his identification and would not positively identify ap-

pellant Smith until he saw him under similar lighting conditions as prevailed at the time of the holdup [R. 19, 20, 36 and 41].

Both appellants, Smith and Montez, admitted being in the vicinity of the bank at the time of the holdup and stated they were in the Story Building located at 610 South Broadway [R. 114] where they saw the Government witness Jobe [R. 123, 225, 226 and 304]. Jobe, the Government witness, however, placed their arrival in the office building at 3:10 or 3:20 P. M. [R. 124] and Jobe further corroborated the identifying witnesses' testimony that appellant Smith wore no hat and needed a shave and a haircut [R. 125 and 129].

The coat [R. 12, 13, 61 and 76] and gun [R. 15, 16, 47, 65] used by Smith in the holdup were identified as the same coat and gun subsequently found in Montez's possession [R. 83, 84, 86, 87, 94] and admittedly in Montez's possession on December 4, 1947 [R. 87, 101, 112, 113]. The amount of money obtained by the holdup man at the time of the robbery was \$2,990.00 [R. 42] in denominations of 5, 10, 20, 50 and 100-dollar bills [R. 11]. The Government witness Patrick testified that he saw Smith and Montez at about 7:30 or 8 o'clock on December 4th subsequent to the holdup at the home of Henry Royal [R. 44] where Smith showed him some money in denominations of 5, 10, 20 and 100-dollar bills [R. 45], stating that he had to have more money and that he had about \$3,000.00 [R. 46]; and, further, that Montez at that time had in his possession a .45 automatic similar to the one used in the holdup [R. 47].

The testimony of the appellants is much in doubt and is hard to believe. Appellant Montez in two interviews with

Special Agent Hutcheson of the Federal Bureau of Investigation denied knowing Smith when shown a picture of Smith, and stated that he had never seen him before [R. 99]; and further stated that on December 4, 1947, at 1 P. M. he had driven down town from his home and parked his car in downtown Los Angeles where he had attended a picture show and *that he was all by himself and met nobody he knew* [R. 101]. At the time of the trial appellant Montez testified that he did know Smith and had first met him on December 2, 1947 [R. 294]; that on the day in question, December 4, he arranged to meet Smith at Sunset and Hollywood Boulevard [R. 300] and drove with Smith downtown, arriving at about 1:30 to a quarter of two [R. 301], where they then proceeded to Fischer's office, arriving at about 2 o'clock [R. 303] where they saw Mr. Jobe [R. 304].

Appellant Smith on cross-examination testified that he made a statement in Chicago to the Federal Bureau of Investigation [Government's Exhibit 5]; that each page of the statement had been read by him and signed and that everything contained therein was true [R. 253, 254, 255]; that at the time the statement was taken he had stated, "I slept late that morning, had breakfast about 11 o'clock and about 3 P. M. of that day I went down to see Mr. Jobe who was a bail bondsman employed by Fischer and Fischer, lawyers. The purpose of my visit to Mr. Jobe was to find out whether or not he could fix up my failure to report to the Parole Board agent in Illinois. I was discussing the parole matter with Mr. Jobe for some hour and a half or two hours and probably left his office with him about 4:45 P. M. Mr. Jobe's office is located in the Broadway Building, 625 Broadway, Los Angeles" [R. 258

and 259]. Prior to being shown Government's Exhibit 5, appellant Smith had testified, on both direct and cross-examination that on December 4th he was in the downtown district of Los Angeles at about 1:30 and went immediately to the Story Building and into the office where they saw Jobe which was about 1:45 P. M. of that day [R. 224, 225, 226 and 257].

Construing the evidence as favorably as possible to the appellants, still it cannot be said that all or any of the substantial evidence could reasonably be consistent with the defendants' innocence.

II. Admission of Evidence Tending to Prove Other Offense Not Error.

In answering this point it is necessary first to include a discussion of Appellants' Point IV that "THE APPELLATE COURT MAY NOTICE SERIOUS ERROR WHICH WAS PLAINLY PREJUDICIAL, ALTHOUGH NOT BROUGHT TO THE ATTENTION OF THE TRIAL COURT," because a reading of the Reporter's Transcript shows that at no time was an objection made by the defendants to any of the testimony relating to another offense, and now for the first time complained of an Appeal in their Point II, pages 7, 8 and 9, of their Opening Brief.

It cannot be denied that Appellants made no objection at the time of the trial to the admission of the evidence now complained of, nor was any motion to strike the evidence admitted made thereafter. The testimony complained of was that of Mr. Jobe [R. 148], which was merely cor-

roborative of Mr. Patrick's testimony [R. 49 and 50] establishing the facts of another similar offense committed by defendants. This testimony was elicited upon cross-examination of a Government witness by defense attorneys themselves.

It is well-settled law that allegedly objectionable matters in criminal prosecution not properly objected to in the trial court may not be considered on appeal.

Matheson v. United States, 227 U. S. 540, 1913;

Alberty v. United States, 91 F. 2d 461, 1937, C. C. A. 9;

Joseph v. United States, 145 F. 2d 74, 1944, C. C. A. 9, cert. den. 323 U. S. 776.

However, it is true that there exists an exception to this general rule in cases involving life and liberty, but only in cases in which the alleged error would seriously affect the fairness, integrity or public reputation of judicial proceedings,

Johnson v. United States, 318 U. S. 189;

United States v. Socony-Vacuum Oil Co., 310 U. S. 150.

or in cases where the alleged error results in a *manifest miscarriage of justice*, taking into consideration the testimony supporting the conviction of the defendant.

Moore v. United States, 161 F. 2d 932, cert. den. 331 U. S. 857;

Giles v. United States, 144 F. 2d 860, C. C. A. 9.

It is the law of this Circuit that the Appellate Court can look into the record far enough to see whether or not there has been a miscarriage of justice, or whether there is testimony tending to support the verdict.

Sherwin v. United States, 112 F. 2d 503, 312 U. S. 654 (in which the Supreme Court instructed the Appellate Court to consider the sufficiency of the evidence to sustain the verdict in the absence of an objection or exception);

Bailey v. United States, 13 F. 2d 325, C. C. A. 9;

Marco v. United States, 26 F. 2d 315, C. C. A. 9;

Giles v. United States, *supra*.

If an examination of the record with reference to an assigned claim of error to which no objection has been made in the District Court discloses no miscarriage of justice, then the Court will not consider such alleged error further. Furthermore, where the record shows that the evidence without doubt sustains the verdict and that the conviction of the defendants is clearly supported by the evidence, the alleged error cannot be prejudicial because no harm could have been done to the defendants and no miscarriage of justice could possibly result where there is a clear showing of guilt.

The case of *Smith v. United States* (267 Fed. 666, C. C. A. 8, 1920), clearly bears this out, at page 667:

“If it appears from the entire record that the accused is clearly guilty, errors not excepted to will afford no ground for reversal * * *.” (Citing *Williams v. U. S.*, 265 Fed. 625.)

See also *Moore v. United States*, 161 F. 2d 932, C. C. A. 5, 1947, at page 933:

“It may not be doubted that while normally a defendant may not claim a reversal except for error duly saved and assigned, this court has the power to reverse, notwithstanding no objection was made and no exception taken, where justice requires. * * * But this does not mean that the appellate court will retry the case as a jury would and determine the guilt or innocence of the defendant for itself. ‘We are not triers of fact.’ *Hargrove v. United States*, 5 Cir., 139 F. 2d 1014. When a defendant is convicted, as appellant here was, on a fair charge and on a trial containing no objections or exceptions to its course and conduct, only the strongest kind of showing that justice has miscarried will avail him. The record is brief, the testimony in what was said and done and in its implications is clear, simple and direct, and it certainly cannot be said that it was a manifest miscarriage of justice to convict upon its showing.”

We respectfully submit that there cannot be a miscarriage of justice in the convictions of the appellants because of the clear showing of their guilt from the record. The alleged error could not be prejudicial to the rights of the defendant in a case in which it appears from the record that the accused were clearly guilty.

From a reading of the evidence at bar, excluding all of the testimony now for the first time objected to relating to another offense, it is clear that the guilt of the defendants was established without any doubt.

It is obvious that had the evidence admitted and now complained of been properly and timely objected to, or in lieu thereof a motion to strike the testimony been made, and

had the court sustained the objection or motion, the conviction of the defendants would be clearly supported. We do not believe that any error was committed by the trial court in admitting evidence of another offense. But if, for the sake of argument, error had been committed, how then can it be said that such error was prejudicial to the rights of the defendants in view of the uncontradicted and corroborative evidence that a robbery of the Bank of America had been committed, wherein the defendant Smith was definitely identified by three witnesses to having been the person who committed it, with the defendant Montez in the vicinity of the bank at the time of the commission of the robbery, with the gun and coat used in the robbery by Smith identified, and both articles later recovered in Montez's possession? Further, the evidence discloses that on the evening of the robbery Smith, in the presence of Montez, admitted having \$3,000.00 and showed the denominations of bills to a witness which was equal to the amount obtained in the robbery, and wherein Montez was seen at the same time in possession of the same or a similar gun identified as being used in the holdup. In view of this evidence, how much more damage to the defendants could have been done by the evidence actually invoked by their attorney that the defendants and one of their witnessed robbed another person by force on the morning of December 5, 1947, than was already done by the clear and convincing proof that these defendants robbed the Bank of America on December 4, 1947?

There might be some merit to defendants' contention that the admission of such evidence was prejudicial had the Government's case against them been built up solely on circumstantial evidence, but here the robber Smith was

identified by three witnesses. The defendants were placed in the vicinity of the bank by another witness at the time of the holdup, and the gun and coat used by Smith was admittedly in the possession of Montez after the robbery and were identified as the articles used by Smith. It is contended that no such argument can fairly be made.

Arguing the actual merits of appellants' Point II, that the admission of testimony of another offense was reversible error, the Government respectfully urges the following:

(A) THAT DEFENDANTS INVITED ADMISSION OF THE EVIDENCE NOW OBJECTED TO AND ARE NOT NOW IN A POSITION TO COMPLAIN.

(B) THAT PROOF OF THE COMMISSION OF A LIKE OFFENSE NEAR THE SAME TIME WAS PROPER.

(A) IF ERROR WAS COMMITTED IN THE ADMISSION OF THE EVIDENCE OF OTHER OFFENSES DEFENDANTS NOT ONLY FAILED TO PROPERLY AND TIMELY OBJECT TO IT, BUT ACTUALLY INVITED IT WITHOUT EXERCISING THE RIGHT TO STRIKE IT.

Curiously enough, the testimony of another robbery by defendants was elicited through the defendants' cross-examination of a Government witness, Patrick.

It is a well-established rule of law that counsel cannot complain of being prejudiced by a situation which he himself created,

Laney v. United States, 294 Fed. 412, App. D. C. 1923,

and cannot complain of error invited by himself.

Shields v. United States, 17 F. 2d 66, rev. 273 U. S. 583, C. C. A. Pa. 1927.

This general principle of estoppel forcefully applies to the admission of evidence.

Proffitt v. United States, 264 Fed. 299, C. C. A. 9, 1920;

Robinson v. United States, 33 F. 2d 238, C. C. A. 9.

The courts are uniform in not permitting an accused to elect to pursue one course at trial and then when that has proven to be unprofitable to insist on appeal that a course which he rejected at the trial be reopened to him.

Johnson v. United States, 318 U. S. 189.

In the case at bar the testimony not objected to in the trial court and complained of now was elicited by defendants' attorney on cross-examination of a Government witness and further gone into by the Government attorney on redirect examination of those same witnesses. Defendants certainly are not entitled to complain of redirect examination affecting other offenses, after having first brought out the matter on cross-examination. A case directly in point is *Cusmano v. United States*, 13 F. 2d 451, cert. den. 273 U. S. 773. In this case defendant was being tried for possessing with intent to use property stolen from interstate commerce. The Government put on the stand one of their witnesses, Louisignan, an express company employee. On cross-examination defendant's counsel brought out of him the testimony that he had delivered to the defendant other stolen packages than the one involved. The Court held that defendant was not entitled to complain of redirect

examination affecting such matter. Said the court at page 452:

“There are two reasons why the error is not available to the defendant. The first is that no exception was reserved to the ruling of the court; and the second, more compelling, that this evidence was first brought out on cross-examination by defendant’s counsel, who inquired of the witness, in detail as to the number of packages delivered to defendant and his associate.”

See also the related cases of

Hood v. United States, 14 F. 2d 925, cert. den.
273 U. S. 765;

McBoyle v. United States, 43 F. 2d 273, rev. 283
U. S. 25;

which further set out the principle that a defendant cannot complain of admissions of evidence elicited by his own counsel nor can he complain that the Government on cross-examination inquired into matters which his own counsel first injected into the case.

The following recital of the evidence here complained of will show without doubt that if error was committed in admitting it, that it was invited by counsel who is now estopped to complain and that the case at bar is identical with that of *Cusmano v. United States*, *supra*.

Patrick testified, on cross-examination by defendants’ counsel [R. 48, 49 and 50]:

“Q. What were you doing on the morning of the 5th of December? A. On the morning of the 5th?

Q. Two days before. A. Two days before the 5th?

The Court: Two days before the 7th. A. Two days before the 7th. Do you mean what special thing I was doing that morning?

Q. By Mr. Freutel: Anything out of the ordinary, yes. A. Yes, it was.

Q. Relate it to the court and jury. A. I brought my car out to the City of Compton.

Q. And what did you do? A. Do you mean what did I do?

Q. After that when you got to Compton.

The Court: Is that what you did when you got arrested? A. No, sir, I drove my car to Compton and parked at a place where I was told to park it by Mr. Royal.

Q. By Mr. Freutel: Was he the man whose name you related here before? A. Yes, sir.

Q. Do you know what purpose Mr. Royal had in asking you to do that? A. Yes, I do.

Q. Tell the court and jury. A. It was to show me—to show me how some of the men would operate in the matter of robbing a person.

Q. This was after the occurrence of the robbery for which you were arrested? A. Yes, it was.

Q. Had you engaged in such educational expeditions with Mr. Royal before? A. No, I hadn't.

Q. Did you see the defendant Smith on the 5th day of December? A. Yes, I did.

Q. Under what circumstances? A. I do not understand you.

Q. What was he doing? A. He was parked in a car down from me where I was parked.

The Court: In Compton? A. In Compton.

Q. By Mr. Freutel: While this briefing was going on after the robbery? A. Yes.

Q. Was the planned robbery ever carried into commission—ever carried out? A. Yes, it was.

Q. That was on the next day? A. No, I believe that was on the 5th.

Q. You planned it in the morning and you carried it out the same day? A. The same day.

The Court: What was it? A bank robbery? A. No, it was a man that owned a check-cashing agency.

Q. By Mr. Freutel: Was the defendant Smith armed at that time? A. Yes, he was.

Q. What was he armed with? A. A .38 police revolver, I believe, a pistol.

On redirect examination of Patrick by the Government, in response to his testimony on cross-examination, only one question was asked of Patrick [R. 56]:

“Q. You went out on this job on Compton Avenue on the morning of the 5th. You testified on cross-examination, Mr. Patrick, that it was a holdup and that Smith went with you in another car, is that correct? A. That is correct.

Q. Did the defendant Montez go out on that job? A. Yes, he did.”

The record therefore discloses that the introduction of evidence into the record of another offense was brought in on cross-examination of a Government witness by the defense and no motion to strike after the testimony was admitted was made on the part of the defendants.

The testimony now objected to by the defendants was elicited by the Government on a redirect examination after cross-examination of the witness Jobe by defendants' attorney, and that this evidence which was brought out on redirect examination of Mr. Jobe was merely corroborative

of the testimony of Patrick and no objection to it nor any motion to strike was made by defendants' counsel. On cross-examination of the witness Jobe [R. 130, 131]:

“Q. Do you recall discussing your daughter with Corie and Montez? A. Discussing my daughter with them?

Q. Just saying you had seen her recently and she was working at a certain— A. That is right, I did that.

Q. That was on the 4th? A. I don't remember what date that was. I could have been the first of second or the third meeting. My daughter was working at El Rancho, 738 West Seventh Street.

Q. The third meeting— A. The first, second, or third.

Q. When was the third meeting? A. It was either at 612 East Twenty-third Street or it might have been at Seventh and Broadway, when I met him at 925 West Seventh. I don't remember when the incident was; I remember discussing my daughter with the two boys.”

On redirect examination, Government's counsel then asked the witness Jobe [R. 147, 148, 149]:

“Q. Did you have a conversation with Corie and Montez on East Twenty-fourth Street? A. Yes, sir, I did, sir.

Q. Can you tell the jury what was the substance of the conversation?

Mr. Avery: Will you fix it, as to time?

Mr. Lillie: Pardon me.

Q. By Mr. Lillie: Approximately what date was it, do you know? A. Oh, I believe, sir, if my memory serves me right, that was around December 5th. I

wouldn't want to be confident. I believe it was a day or two days after that bank robbery, or something.

Q. Was it at night or in the daytime? A. It was in the morning, sir.

Q. What time in the morning, approximately? A. I would say approximately 9:30 in the morning.

Q. There was just yourself, Montez, and Corie there? A. That is right, where we were talking. Other people in the house, but only those three where we were talking, sir.

Q. What was your conversation? A. Well, sir, I had—I think I had 60 or 70 cents laying out on the table there, and they were kidding me. Montez reached over and picked up the change, and I said, 'Wait a minute. Don't take my cigarette money.'

So he said—he took some more money and threw it out on the table. He said, 'I would leave you some more, but that is all I got, Mr. Jobe.' He said, 'We'—I don't know; they had done something and they didn't make no money; four of them, only seven and a half apiece, or seven—\$28.00 split four ways was \$7.00, and that was all they had.

Q. What was this 'something' they did? A. Robbed somebody; robbed somebody. Knocked some old man in the head with a pistol and robbed some collector or something. I don't know what it was.

Mr. Avery: Objected to, unless he is relating a conversation with one of the defendants.

The Court: Yes, that is correct. Is this what they stated to you?

The Witness: Yes.

The Court: The jury is instructed to disregard what the witness previously stated.

What did they tell you?

The Witness: They told me they went out and got a tip on some man going to the bank. His wife was walking four or five steps behind him, or some other thing, and Bill Montez told me Corie was crazy, said Corie hit this old man over the head with a pistol and the man went down, and Bill Montez said, 'The bullet barely hit my head. He almost killed me.' "

It is obvious that it was only after the incident of the conversation was brought out on cross-examination that on redirect the witness Jobe testified that another offense had been committed by the defendants; that no objection was made to the testimony except the objection made by Mr. Avery [R. 149], wherein he stated:

"Objected to, unless he is relating a conversation with one of the defendants."

The court then said: "Is this what they stated to you?", and the witness answered "Yes." Thereafter, the witness testified to the other offense committed by the defendants which was merely corroborative of the testimony of Patrick, with no objection made to the production of the testimony nor any motion to strike made after it was given.

In the appellants' appeal brief and the points upon which they rely, no objection is made to the testimony of Patrick, from whom was illicitly obtained on cross-examination by defendants' counsel the first facts of another offense committed by the defendants. No more prejudice to the defendants could accrue, if any accrued by Jobe's corroboration of Patrick's testimony than was already in the record and if this caused any prejudice to defendants rightly or wrongly defendants are responsible for it. They them-

selves invited the testimony in the first instance on the cross-examination of Patrick. How then can defendants claim unfair surprise and embarrassment? The evidence was originally introduced by the cross-examination of the defendants' counsel of the witness Patrick, and they now claim that the invited testimony was improperly admitted.

It is significant that no error was committed by the court nor was the jury guilty of misconduct during this trial. It is to be noted that the error assigned by counsel is to testimony of corroborative nature brought out on redirect, after being opened up on cross-examination by defendants' counsel, the original testimony being introduced into evidence through cross-examination of the defense counsel of the witness Patrick. Counsel, therefore, relies upon his failure to protect the rights of his accused clients as a ground for reversal. If such rule were adopted accused defendant could hire incompetent counsel and then, after conviction, employ an abler and more diligent counsel to appeal the mistakes of his predecessor as grounds for reversal.

(B) ADMISSION OF PROOF OF ANOTHER OFFENSE RELATED
TO THAT CHARGED IN THE INDICTMENT WAS PROPER.

The Reporter's Transcript discloses that the witness Jobe, on redirect examination by the Government, testified to a conversation which occurred one day after the offense charged had been committed, wherein the defendants admitted to Jobe their participation in a robbery of a person on December 5, 1947, and in which Patrick and Royal participated, Corey knocking "some old man in the head with a pistol" and that the bullet barely missed defendant Montez's head [R. 149].

In the first place, the robbery by defendants of "this old man" was similar to the offense charged in the indictment. They both involved the use of force in taking away money that belonged to another by putting both victims in fear by using a gun. Such evidence proves that the acts of the defendants in robbing the Bank of America were not innocent or mistaken, but constitute an intentional violation of the law.

The purpose was to show how some of the men would operate in a robbery (this was the robbery which was carried out and testified to by Jobe that Smith and Montez had participated in in Compton). Defendant Smith was present, parked in another car [R. 50], and defendant Montez was present and participated in the robbery [R. 56]. Patrick further testified that in the evening of the fourth (the day of the Bank of America holdup), when he was with Smith and Montez at Royal's house, that when Smith showed Patrick the Bank of America money Patrick asked Smith if he could go make some money like that. Smith replied, "Yes, you can go. You see Henry." Thereafter he saw Henry and was taken on the Compton robbery by Smith and Montez [R. 51].

These facts in themselves prove a common scheme or plan upon the part of not only Smith and Montez, but also of Royal and Patrick to unlawfully procure money by robbery at gun-point. The commission of the second robbery at Compton within 24 hours is so closely related, both in time and methods, to the robbery of the Bank of America that proof of one tends to establish proof of the other.

Both Smith and Montez attempted to establish alibis at the time of the robbery of the Bank of America, putting their identity at issue.

In the case of *Martin v. United States*, 127 F. 2d 865, at page 868, the court said:

“This doctrine is not carried so far as to exclude evidence which has a direct tendency to prove the particular crime for which the prisoner is indicted.

The exceptions, however, to this rule are few, and they are well stated in *People v. Molineux*, 168 N. Y. 264, 293, 61 N. E. 286, 62 L. R. A. 193, thus: ‘Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.’ (26 App. D. C. at 536.)

The subject of the rule and its exception is helpfully discussed in *People v. Molineux*, 1901, cited in the quotation, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, and even more helpfully, I think, in *Whiteman v. State*, 1928; 119 Ohio St. 285, 164 N. E. 51, 63 A. L. R. 595.”

Not only was the evidence of the other robbery properly admitted for the above purposes, but such testimony relating to the robbery of “this old man” could not have been more plain or clear and conclusive to show a course of conduct on the part of the defendants, disclosing an intentional violation of the law by positively identified persons who apparently pursued a plan of robbery to make money.

IV. Conclusion.

The evidence shows that not only was it sufficient to justify the verdict but in no way can it be said that it is as consistent with innocence as with guilt.

The evidence is so clear in support of the conviction any alleged error admitting evidence of other offenses could not possibly be prejudicial. More important, perhaps, is the clear showing that no error was committed by the trial court in the first instance in admitting proof of other offenses.

For these reasons we respectfully request that the convictions of the appellants herein be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief, Criminal Division,

CAMERON L. LILLIE,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 12011

United States
Court of Appeals
for the Ninth Circuit

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petition to Review a Decision of The Tax Court
of the United States

FILED
SEP 23 1948

PAUL P. O'BRIEN,

No. 12011

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:

F. T. RITTER, Esq.

For Respondent:

A. J. HURLEY, Esq.

Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1946

Aug. 26—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 26—Copy of petition served on General Counsel.

Aug. 26—Request for hearing at Los Angeles, California, filed by taxpayer. 8/30/46 Granted.

Oct. 16—Answer filed by General Counsel.

Oct. 24—Copy of answer served on taxpayer—Los Angeles, California.

1947

Sept. 30—Hearing set December 1, 1947—Los Angeles.

Dec. 8—Hearing had before Judge Disney on merits. Stipulation of facts filed. Briefs due 1/15/48. Replies 2/10/48.

1948

Jan. 12—Brief filed by General Counsel.

Jan. 12—Brief filed by taxpayer. 1/13/48 Copy served.

Feb. 9—Reply brief filed by taxpayer. Copy served.

Apr. 6—Memorandum findings of fact and opinion rendered. Judge Disney. Decision will be entered for the respondent. 4/7/48 Copy served.

Apr. 7—Decision entered. Judge Disney. Div. 4.

July 6—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

July 8—Proof of service filed.

July 12—Praecipe for record filed by taxpayer.

July 22—Praecipe for record filed by taxpayer with proof of service thereon. No counter praecipe will be filed. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue, in his notice of deficiency (Bureau symbols LA:ET:90D:NAB) dated May 29, 1946, and as a basis for her proceeding alleges as follows:

1. The petitioner is the duly appointed executrix of the estate of her deceased husband, John E. Burrell, with residence at 715 East Marshall Place, Long Beach, California (certified copy of letters testamentary attached). The return for the estate here involved was filed with the collector for the 6th District of California.

2. The notice of deficiency (copy of which is attached and marked Exhibit "A") was mailed to the petitioner on May 29, 1946. [2]

3. The taxes in controversy are estate taxes assessed July 28, 1943. The deficiency asserted is \$2,199.80, all of which is in controversy.

4. The determination of tax set forth in said deficiency is based upon the following errors:

(a) In determining the decedent's interest in jointly owned property to be \$110,147.87, as per Schedule 1 of Exhibit "B" annexed hereto, the Commissioner erroneously excluded as deductions from jointly owned property, claims which had matured and were owing at the time of decedent's death in the sum of \$10,344.12 for unpaid income taxes of decedent's wife, who was also co-joint tenant in the jointly owned property of decedent. The petitioner contends that decedent's interest in jointly owned property, and as a result, his entire estate is thereby made \$10,344.12 larger in death than in life.

(b) The Commissioner erred in Not determining the gross value of the estate of the decedent to consist of the following items aggregating in value \$123,791.48:

Stocks and bonds	\$ 60.00
Insurance	6,827.45
Jointly owned property.....	99,803.75
Other miscellaneous property	17,100.48
	<hr/>
	\$123,791.48

(c) The Commissioner erred in excluding deductions for debts of decedent in the sum of \$1,891.13 as being in excess of the value of property in the decedent's estate subject to claims.

(d) The Commissioner erred in Not determining decedent's net estate for "Basic Tax" to be \$4,739.87.

(e) The Commissioner erred in Not determining

decedent's net estate for "Additional Tax" to be \$44,739.87.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(a) The decedent died July 28, 1943 in Long Beach, California.

(b) The decedent, John E. Burrell and his wife, Arley M. Burrell, were married October 28, 1907 and had resided in the State of California for approximately thirty years prior to decedent's death.

(c) The decedent was engaged in the general contracting business throughout his married life.

(d) The decedent and his wife accumulated an estate of approximately \$113,447.36 during decedent's lifetime.

(e) The decedent's income during his lifetime and residence in California was community income.

(f) The decedent and his wife, Arley M. Burrell, had for many years held their properties in joint tenancy and with the exception of decedent's interest in the contracting business and his automobile, aggregating in value \$17,160.48, all their estate was held in joint tenancy at the time of decedent's death.

(g) The decedent, John E. Burrell, and his wife, Arley M. Burrell, had filed separate income tax returns with the federal government and the State of California on their community income for the year 1942, and the liability for the calendar year 1942 on each of such returns was respectively, \$18,245.06 and \$1,583.37 for each spouse.

(h) The primary source of community income to

decedent and his wife during decedent's life was the earnings of decedent in the contracting business.

(i) There had been assessed and were still due the following amounts of income taxes at the date of decedent's death:

California income taxes—year 1942

Husband\$1,055.58

Wife 1,055.58

Federal income taxes—year 1942

Husband\$9,122.54

Wife 9,122.54 [5]

Federal income taxes—year 1941

Husband\$166.00

Wife 166.00

(j) The decedent's wife, Arley M. Burrell, did not have a separate estate during the life of her deceased husband, John E. Burrell. Her entire estate consisted of her rights and interest in the joint tenancy property and community property of hers and the decedent's.

(k) The earnings upon which the income tax obligations of Arley M. Burrell were matured at the date of decedent's death are included in the jointly owned property of the estate of John E. Burrell, deceased, as determined by the Commissioner in the decedent's estate tax return.

Wherefore the petitioner prays that this Court may hear the proceeding and determine That

(a) the claims for unpaid income taxes in the sum of \$10,344.12 against decedent's wife and co-

joint tenant at the time of his death have priority over the interest of the decedent in the jointly owned property, and that the decedent's interest in jointly owned property is therefore subordinate to such claims under Section 811(e) of the Internal Revenue Code.

(b) in the alternative, that the unpaid income taxes of decedent's wife at the time of his death are proper deductions [6] against the estate in its entirety under Section 812(b) of the Internal Revenue Code, And

Order refund and abatement accordingly.

Respectfully submitted,

/s/ F. T. RITTER,

Counsel for Petitioner. [7]

I, Arley M. Burrell, hereby make oath that I am the duly appointed and acting Executrix of the Estate of John E. Burrell, deceased, and that I have read the foregoing petition and that the facts therein stated are true.

/s/ ARLEY M. BURRELL,

Executrix.

Subscribed and sworn to before me this 20th day of August, 1946.

/s/ HAZEL ROBERTS,

Notary Public. [8]

In the Superior Court of the State of California
in and for the County of Orange

No. A-11111

In the Matter of the Estate of John E. Burrell, Sr.,
also known as John E. Burrell, also known as
J. E. Burrell, Deceased.

LETTERS TESTAMENTARY

State of California,
County of Orange—ss.

The Last Will Of
deceased, having been proved in the Superior Court
of the County of Orange, Arley M. Burrell, who is
named therein as such, is hereby appointed Execu-
trix.

Witness, B. J. Smith, Clerk of the Superior Court
of the County of Orange, with the seal of the Court
affixed, the 3rd day of September, 1943.

By order of the Court.

(Superior Court Seal)

B. J. SMITH,
County Clerk.

By E. R. KOLBE,
Deputy.

State of California,
County of Orange—ss.

I do solemnly swear that I will support the Con-
stitution of the United States, and the Constitution
of the State of California, and that I will faithfully
perform, according to the law, the duties of the

office of Executrix of the Last Will of the above named decedent.

ARLEY M. BURRELL.

Subscribed and sworn to before me, this 3rd day of September, 1943.

B. J. SMITH,

County Clerk and ex-officio

Clerk of the Superior Court.

By E. R. KOLBE,

Deputy.

(Notarial Seal)

(Superior Court Seal)

State of California,
County of Orange—ss.

I, B. J. Smith, County Clerk and ex-officio Clerk of the Superior Court within and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and correct copy of the original Letters Testamentary granted herein, as the same appears on file in my office.

I further certify that said Letters have been revoked and are in full force and effect at the present time, and entitled to full faith and credit.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court, this 15th day of August, 1946.

(Seal)

B. J. SMITH,

County Clerk.

By /s/ H. M. HEAD,

Deputy.

[Endorsed]: Filed Sept. 3, 1943. B. J. Smith, County Clerk. By K. Deputy.

EXHIBIT "A"

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of May 29, 1946
Internal Revenue Agent in Charge,
Los Angeles Division.
LA:ET:90D:NAB

Estate of John E. Burrell, deceased
Arley M. Burrell, Executrix
715 East Marshall Place
Long Beach, California

Dear Mrs. Burrell:

You are advised that the determination of the estate tax liability of the above-named estate discloses a deficiency of \$2,199.80, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in Charge.

NAB:vac Enclosures: Statement, Form of waiver.

Statement

	Liability	Assessed	Deficiency
Estate tax	\$8,607.98	\$6,408.18	\$2,199.80

In making this determination of the federal estate tax liability of the above named estate, careful consideration has been given to the report of examination dated March 29, 1945, to the protest dated May 16, 1945, and to the statements made at the hearings on July 30, 1945, and March 22, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. F. T. Ritter, 605 Jergins Trust Building, Long Beach 2, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Estate

Net estate for basic tax as disclosed by the return....	\$	7,585.75	
Additions to value of net estate and decreases in deductions:			
Deductions	\$	12,950.06	12,950.06
			<hr/>
			\$ 20,535.81
Reductions in value of net estate and increases in deductions:			
Insurance	\$	481.68	
Jointly owned property.....		3,079.01	3,560.69
			<hr/>
Net estate for basic tax as adjusted.....	\$	16,975.12	
Net estate for additional tax as adjusted.....	\$	56,975.12	

Explanation of Adjustments

Insurance:	Returned	Determined
Item 1	\$ 5,000.00	\$ 4,518.32
Difference		\$ 481.68
Jointly owned property:		
Item 1	\$ 12,500.00	\$ 8,500.00
Item 4	7,425.00	7,400.00
Item 4, accrued dividend	0.00	140.00
Item 5, accrued dividend	0.00	100.00
Item 6	2,700.00	2,917.50
Item 6, accrued dividend	0.00	39.87
Item 8, accrued dividend	0.00	160.00
Item 10	2,872.50	2,891.25
Item 10, accrued dividend	0.00	26.12
Item 11	3,900.00	3,950.00
Item 11, accrued dividend	0.00	22.50
Item 14, accrued dividend	0.00	50.00
Item 15, accrued interest	0.00	97.50
Item 16, accrued interest	0.00	23.75
	<hr/>	<hr/>
Totals	\$ 29,397.50	\$ 26,318.49
Difference		\$ 3,079.01

Item 1 (the home place) is corrected to a gross value of \$16,000.00 at date of death, less a trust deed encumbrance in the amount of \$7,500.00, which latter was not claimed elsewhere in the return.

Items 4, 6, 10, and 11 are corrected to the mean between high and low sales, or bid and asked price,

on the date of death. Dividends and interest on the other items accrued at date of death as shown above, and were received thereafter.

Deductions:

Total	\$ 30,110.54	\$ 17,160.48
Difference		\$ 12,950.06

Total deductions from gross estate as provided in section 812(b) of the Internal Revenue Code have been reduced from \$30,110.54 to \$17,160.48 as follows:

(a) The amount of \$714.81 claimed on Schedule J for executor's commissions has been disallowed since payment was [12] waived by the executrix.

(b) The following items claimed in Schedule K do not constitute allowable deductions from gross estate:

1941 Federal income tax—Arley M. Burrell.....	\$ 166.00
1942 California income tax—Arley M. Burrell	1,055.58
*1942 Federal income tax—Arley M. Burrell.....	9,122.54
Total.....	<u>\$ 10,344.12</u>

* This item represents the last two quarterly installments for 1942 which were discharged as of September 1, 1943, under section 6 of the Current Tax Payment Act of 1943.

(c) The remaining deductions have been reduced by \$1,891.13 representing the amount by which such deductions exceed the value, at date of death, of property subject to claims.

Computation of Estate Tax

	Returned	Determined	
Gross estate for basic tax.....	\$137,696.29	\$134,135.60	
Deductions.....	130,110.54	117,160.48	
Net estate for basic tax.....	\$ 7,585.75	\$ 16,975.12	
Net estate for additional tax	\$ 47,585.75	\$ 56,975.12	
Gross basic tax.....		\$ 169.75	
Credit for estate and inheritance tax		135.80	
Net basic tax.....			\$ 33.95
Total gross taxes (basic and additional)		\$ 8,743.78	
Gross basic tax.....		169.75	
Net additional tax.....			8,574.03
Total net basic and additional taxes.....			\$8,607.98
Total tax payable.....			\$8,607.98
Estate tax assessed:			
Original October 1944 list, page 102, line 4.....			6,408.18
Deficiency			\$2,199.80

EXHIBIT "B"

Form 1210

Treasury Department
Internal Revenue Service
417 S. Hill Street
Los Angeles 13, California

Office of Internal Revenue Agent in Charge
Los Angeles Division
LA:ET:30D

Estate of John E. Burrell, Deceased
Arley M. Burrell, Executrix
715 E. Marshal Place,
Long Beach, California

Dear Mrs. Burrell:

Enclosed is a copy of the report of examination of the estate tax return of the above-named estate.

After consideration by this office, the adjustment of the tax liability shown therein appears to be warranted.

If You Agree to the adjustment shown in the accompanying report, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the deficiency in tax and to stop the accumulation of interest. Such interest will cease 30 days after the receipt of the executed form, or upon the payment of the deficiency in tax to the collector, whichever occurs first.

If you desire to make immediate payment of the deficiency in tax without awaiting assessment, you should forward your remittance to the Collector of Internal Revenue at Los Angeles 12, California, enclosing this letter, or a copy thereof. Interest on the deficiency in tax should be included in your remittance, computed at the rate of 6 percent per annum from the due date of the tax to the date of payment.

If You Do Not Agree to the proposed adjustment, you may file a protest, executed in triplicate under oath, with this office, within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency against the estate. This letter is not a final notice of deficiency, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to pay the deficiency in tax to the collector of internal revenue or to file with this office within the 30-day period mentioned either a waiver on the enclosed form or a written protest, final determination of the tax liability of the estate will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of estate tax deficiencies.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

/s/ GEORGE D. MARTIN,

Internal Revenue Agent in Charge.

Enclosures: Report of examination. Form of waiver 890. Form of acknowledgment. [15]

Examining officer Milton McGrew. Date of report—3/29/45.

Preliminary Statement

Statement of Tax Liability

	Tax previously assessed	Adjustments in this report		Correct tax Liability
		Deficiency	Overassessment	
Estate tax	\$6,408.18	\$2,199.80		\$8,607.98

The deficiency here results principally from the limitations of deductions to the value of property subject to claims. [16]

Form 4-AG

Form 1272

Schedule 1

Line Adjustments—Estate Tax

	Return	Additions to value of estate	Deductions from value of estate	Corrected
A. Real estate	-----	-----	-----	-----
B. Stocks and bonds	\$ 60.00	-----	-----	\$ 60.00
C. Mortgages, notes and cash	-----	-----	-----	-----
D. Insurance	7,308.93	-----	481.68	6,827.25
E. Jointly owned property	113,226.88	-----	3,079.01	110,147.87
F. Other miscellane- ous property	17,100.48	-----	-----	17,100.48
G. Transfers	-----	-----	-----	-----
H. Powers of ap- pointment	-----	-----	-----	-----
I. Property previ- ously taxed	-----	-----	-----	-----
Total Gross Estate	137,696.29	-----	3,560.69	134,135.60
J-1. Funeral ex- penses	1,366.09	-----	-----	1,366.09
J-2. Executors' com- missions	714.81	714.81	-----	0.00
J-3. Attorneys' fees	714.81	-----	-----	714.81
J-4. Misc. administra- tion expenses	441.58	-----	-----	441.58
K. Debts of decedent	23,273.25	-----	-----	23,273.25
L. Mortgages and liens	-----	-----	-----	-----
M-1. Net losses during administration	-----	-----	-----	-----
M-2. Support of dependents	3,600.00	-----	-----	3,600.00
Limitation on De- ductions	-----	12,235.25	-----	(12,235.25)
Total above	-----	-----	-----	-----
Deductions	30,110.54	12,950.06	-----	17,160.58
For Basic Tax	-----	-----	-----	-----
Specific exemption	100,000.00	-----	-----	100,000.00
Deduction for prop- erty previously taxed	0.00	-----	-----	0.00
Total deductions	130,110.54	12,950.06	-----	117,160.48

	Return	Additions to value of estate	Deductions from value of estate	Corrected
For Additional Tax				
Specific exemption	60,000.00	60,000.00
Deduction for prop- erty previously taxed	0.00	0.00
Total Deductions	90,110.54	12,950.06	77,160.48
Net Estate	\$47,585.75	12,950.06	3,560.69	\$56,975.12

Schedule 1-A

Explanation of Changes in Gross Estate

D—Insurance:	Returned	Corrected
Item 1	\$ 5,000.00	\$ 4,518.32
Difference.....		\$ 481.68

Corrected to the amount of proceeds per insurer's statement.

E—Jointly Owned Property	Returned	Corrected
Item 1	\$12,500.00	\$ 8,500.00
Item 4	7,425.00	7,400.00
Item 4, accrued dividend	0.00	140.00
Item 4, accrued dividend	0.00	100.00
Item 6	2,700.00	2,917.50
Item 6, accrued dividend	0.00	39.87
Item 8, accrued dividend	0.00	160.00
Item 10	2,872.50	2,891.25
Item 10, accrued dividend	0.00	26.12
Item 11	3,900.00	3,950.00
Item 11, accrued dividend	0.00	22.50
Item 14, accrued dividend	0.00	50.00
Item 15, accrued interest	0.00	97.50
Item 16, accrued interest	0.00	23.75
Totals	\$29,397.50	\$26,318.49
Difference		\$ 3,079.01

Item 1 (the home place) is corrected to a gross value of \$16,000.00 at date of death, less a trust deed encumbrance in the amount of \$7,500.00, which latter was not claimed elsewhere in the return.

Items 4, 6, 10 and 11 are corrected to the mean between high and low sales, or bid and asked prices, on the date of death. Dividends and interest on the other items accrued at date of death as shown above, and were received thereafter.

Schedule 1-B

Explanation of Changes in Deductions

J-2 Executrix' commissions	\$ 714.81	\$ 0.00
Total other deductions.....	29,395.73	29,395.73
	<hr/>	<hr/>
Total deductions	\$ 30,110.54	\$ 29,395.73
Less, property subject to claims.....		17,160.48
		<hr/>
Excess deductions disallowed.....		\$ 12,235.25
Executrix' commissions have been waived and are disallowed.		

Section 812(b) of the Internal Revenue Code, as amended by section 405 of the Revenue Act of 1942, limits the total deductions to the value of property subject to claims. The value of property subject to claims was as follows:

Schedules B, \$60.00; F, \$17,100.48. Total, \$17,-160.48. [19]

Form 1273

Schedule 2

Computation of Estate Tax

	Return	Corrected
Net estate (for basic tax)	\$7,585.75	\$16,975.12
Net estate (for additional tax)	47,585.75	56,975.12
	<hr/>	<hr/>
1. Gross basic tax	75.86	169.75
2. Credit for gift tax	0.00	0.00
	<hr/>	<hr/>
3. Gross basic tax less gift tax credit	75.86	169.75
4. Credit for estate and inheritance taxes	60.69	135.80
	<hr/>	<hr/>
5. Net Basic Tax	\$ 15.17	\$ 33.95
	<hr/>	<hr/>

	Return	Corrected
6. Total gross taxes (basic and additional)	6,468.87	8,743.78
7. Gross basic tax	75.86	169.75
8. Gross add. tax	6,393.01	8,574.03
9. Credit for gift tax	0.00	0.00
10. Net Additional Tax	\$6,393.01	\$8,574.03
11. Total net basic and additional taxes	\$6,408.18	\$8,607.98
12. Defense tax (10 percent of item 11)	0.00	0.00
13. Total Tax Payable	\$6,408.18	\$8,607.98
Total tax assessed		6,408.18
Deficiency		\$2,199.80

[Endorsed]: Filed Aug. 26, 1946. [20]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are estate taxes. Denies the remainder of the allegations contained in paragraph 3 of the petition.

4(a) to (e), inclusive. Denies the allegations of

error contained in subparagraphs (a) to (e), inclusive, of paragraph 4 of the petition. [21]

5(a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

5(b). Admits that the decedent, John E. Burrell, and Arley M. Burrell were husband and wife on July 28, 1943. For lack of sufficient information as to the truth or correctness thereof, denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

5(c). For lack of sufficient information as to the truth or correctness thereof, denies the allegations contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e). For lack of sufficient information as to the truth or correctness thereof, denies the allegations contained in subparagraph (e) of paragraph 5 of the petition.

5(f). Admits the allegations contained in subparagraph (f) of paragraph 5 of the petition.

5(g) and (h). For lack of sufficient information as to the truth or correctness thereof, denies the allegations contained in subparagraphs (g) and (h) of paragraph 5 of the petition.

5(i), (j), and (k). Denies the allegations contained in subparagraphs (i), (j), and (k) of paragraph 5 of the petition. [22]

6. Denies each and every allegation contained in

the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECC
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
A. J. HURLEY,
Special Attorneys, Bureau of
Internal Revenue.

[Endorsed]: Filed Oct. 16, 1946. [23]

The Tax Court of the United States
Estate of John E. Burrell, Deceased, Arley M. Burrell, Executrix, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 11886

F. T. Ritter, C.P.A., for the petitioner.

A. J. Hurley, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND
OPINION

Disney, Judge: This case involves estate tax. A deficiency was determined in the amount of \$2,199.80,

all of which is in controversy. The question presented is whether the Commissioner erred in disallowing a deduction of \$10,344.12 from the decedent's gross estate. The major portion of the facts was stipulated. The stipulation is adopted by reference and the facts therein set forth will, so far as necessary to an examination of the issue, be included with facts found from evidence adduced in our [24]

FINDINGS OF FACT

The petitioner is the Estate of John E. Burrell, deceased, who died July 28, 1943 a resident of California. Arley M. Burrell is the duly appointed executrix. The estate tax return was filed with the collector of internal revenue for the sixth district of California.

The decedent, John E. Burrell, and Arley M. Burrell were husband and wife, and they resided in the State of California as husband and wife for thirty years prior to decedent's death.

The decedent was engaged in the general contracting business throughout his married life, and his income therefrom was community income. All the properties in the estate of decedent and his widow were derived from the earnings of decedent during their marriage.

Decedent and his wife, Arley M. Burrell, converted their property into joint tenancy during their marriage, except the portion of their property used in decedent's business. Decedent's gross estate

was returned for estate tax purposes as follows (after audit):

Stock and bonds.....	\$ 60.00
Insurance	6,827.25
Jointly-owned property	110,147.87
Other property (property used in decendent's business)	17,100.48
	<hr/>
	\$134,135.60

The foregoing list of property constituted all the property accumulated by decedent and his wife during their married life. [25]

The total deductions claimed on the return amounted to \$29,395.73 (after audit), and included in addition to debts, funeral and administrative expenses, Federal and state income taxes assessed prior to the death of decedent, as follows:

	Federal Income Taxes Year 1941	Federal Income Taxes Year 1942	California Income Taxes Year 1942
John E. Burrell, husband	\$166.00	\$9,122.54	\$1,055.58
Arley M. Burrell, wife	166.00	9,122.54	1,055.58

The value at the date of decedent's death of property subject to claims was \$17,160.48.

The decedent and his wife filed separate income tax returns with the Federal government and the State of California on their respective shares of joint and community income for the years 1941, 1942, and 1943. There were no statutory gifts between the decedent and his wife during decedent's lifetime.

All the valuations determined by the Commissioner in the estate are correct. The deductions, as determined by the Commissioner, apart from the issue of deductibility, are correct.

The estate tax return included among assets of the estate bank accounts held in joint tenancy by the decedent and his wife totaling approximately \$40,000. The separate income tax return of the decedent's wife for the year 1942 referred to the income reported as community income and reported a tax of \$18,245.06. Her return for the year 1943 showed a tax of \$119.36. After the death of the decedent she paid all claims against the estate, and paid a total of \$10,344.12 state and Federal income taxes for herself for 1941, 1942, and 1943, the amount being included in payments of \$4,561.26 on each of the [26] following dates: March 15, 1943; June 15, 1943, September 15, 1943, and December 15, 1943. The actual net worth of the decedent's estate and the amount determined by the Commissioner was \$134,135.60. Claims were filed against the estate in the total amount of \$29,395.73. Of that amount, the Commissioner, in determining the net estate, allowed \$17,160.48, disallowing \$1,891.13 of claims itemized as "Debts other than income taxes", and disallowing \$10,344.12, the amount of income taxes of the decedent's wife, Arley M. Burrell.

OPINION

The question presented here is purely one of law; the parties are not in dispute as to the facts. They

agree that the value at the date of decedent's death of property subject to claims was \$17,160.48. To that figure the Commissioner, under section 812(b) (5) of the Internal Revenue Code, limited the allowance of claims deducted. On reply brief, the petitioner agrees with the respondent that the unpaid income tax obligations of Arley M. Burrell are not proper deductions from the gross estate of the decedent. She further agrees that the \$1,891.13 of "Debts other than income taxes" above the \$17,160.48 was properly disallowed. The only contention made is summarized in the reply brief, that is, that the Court determine that the decedent's wife, the surviving tenant in joint tenancy, made a contribution to the jointly owned property of John E. Burrell and Arley M. Burrell in the sum of \$10,344.12, and that the gross estate of the decedent at the time of his death is \$123,791.48. In short, the petitioner contends that the estate of the decedent was \$10,344.12 less than determined by the Commissioner because of the fact that the wife, although a joint tenant with her husband in the entire estate, contributed [27] \$10,344.12 thereto because of having filed separate income tax returns for 1941, 1942, and 1943, and having paid that amount of taxes.

The Petitioner's argument, in sum, is that when the wife under the direction of her husband filed a separate income tax return reporting one-half of the community income, she incurred a personal liability in behalf of the community, and that a separate property interest was thereby created in her favor and carved out of the community estate; also,

that upon the conversion of the California community property, originally earned by the husband, into joint tenancy, she was a contributor to the joint tenancy under section 811(e)(1) of the Internal Revenue Code. She argues that a trust was impressed upon the joint estate in her favor and for a valuable consideration, by reason of her payment of the taxes.

We have examined this theory with interest but we find it tenuous rather than substantial. The husband died after October 22, 1942, and after the amendment of section 811 (e) of the Code to include in the decedent's gross estate the value of property held in joint tenancy—as it is agreed the gross estate here was held. The exception set forth in the statute requires that the surviving joint tenant must have originally owned the property claimed not to be included in the gross estate, and must never have received or acquired it from the decedent for less than an adequate and full consideration. We do not think that the petitioner has shown the situation here involved to be within the exception. The property had been community, earned by the husband. Did the wife, merely by filing separate income tax returns upon half of the joint income and paying the tax thereon, make a contribution in that amount to the joint estate? In our opinion the answer is in the negative. [28]

In the case of *Estate of Benjamin Franklin McGrew*, 46 B.T.A. 623, where the question was, as here, whether a certain amount was includible in a decedent's gross estate, we held that it was, in the

absence of a showing that it had been acquired from the decedent for an adequate and full consideration, holding that the fact that the wife had supplied the husband with funds with which to satisfy his creditors did not constitute consideration unless the advances were loans accompanied by a promise that they would be repaid. Quoting *Fox vs. Rothensies*, 115 Fed. (2d) 42, that "Expenditures out of the wife's separate estate made by the husband with her knowledge and consent will not render him liable to account for the same", we came to the conclusion that there was no evidence that the wife expected repayment or that decedent's funds, with which the joint account in question was opened, were given to the wife to liquidate any such promise or constituted an adequate and full consideration.

The petitioner's case here seems much weaker than in the cited case, for she simply relies upon separate income tax returns and payment of the tax. Obviously, there is, under the test in the *McGrew* case, nothing here to indicate a claim for adequate consideration against the decedent's estate. Although she states upon brief that the separate income tax returns were filed under the direction of her husband, no evidence whatever supports that statement.

The argument that there was a trust relationship between husband and wife is not, in our view, at all sufficient to establish the proper basis for a contribution to the estate within the intendment of section 811 (e) (1) of the Code. The statute sets a definite test for an exception to the rule that the in-

terest held as joint tenants by the decedent and another is includible in his gross estate, and we find nothing, either by way of trust relationship or legal consideration, to support separate ownership or contribution by the wife of [29] the funds here in question so that they should not be included in the joint estate and therefore within the gross estate of the decedent.

We conclude and hold that the gross estate was \$134,135.60. It having been agreed that \$17,160.48 was the value at the date of the decedent's death of property subject to the payment of claims, the Commissioner properly disallowed the remainder of the \$29,395.73 claims filed.

Decision will be entered for the respondent.

Entered April 6, 1948. [30]

The Tax Court of the United States
Washington

Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered April 6, 1948, it is

Ordered and Decided: That there is a deficiency in estate tax of \$2,199.80.

(Seal) /s/ R. L. DISNEY,
Judge.

Entered April 7, 1948. [31]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Petition of Estate of John E. Burrell, deceased,
Arley M. Burrell, Executrix, for Review by the
United States Circuit Court of Appeals for the
Ninth Circuit of a Decision by The Tax Court of
the United States.

The Estate of John E. Burrell, deceased, Arley
M. Burrell, executrix, the petitioner in this cause,

by F. T. Ritter, counsel, hereby files its petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision by The Tax Court of the United States rendered on April 7, 1948, P. 48,051 P-H Memo TC, determining a deficiency in the petitioner's Federal estate tax in the amount of \$2,199.80. [32]

I.

The petitioner is the Estate of John E. Burrell, deceased, who died July 28, 1943. Arley M. Burrell, widow of decedent, residing in Long Beach, California, is the duly appointed executrix. The return for the estate here involved was filed with the Collector for the 6th District of California.

II.

Nature of the Controversy

The controversy involves the proper determination of the petitioner's liability for federal estate taxes.

The decedent during his thirty years of residence in California had been in the contracting business. As earnings were made in the business and were available for withdrawal, they were withdrawn by him and converted into joint tenancy property of John E. Burrell and Arley M. Burrell (husband and wife). The conversion took place immediately upon withdrawal and prior to the payment of income taxes thereon.

The nature of the income of the contracting business during his lifetime was community income.

It was decedent's practice to file separate income tax [33] returns for himself and his wife, each

reporting one-half of the community income on the respective returns. Arley M. Burrell, wife of decedent, was, as a result of this practice, at the time of decedent's death still obligated to pay federal and state income taxes in the sum of \$10,344.12 for the years 1941 and 1942 and did later pay this amount on income originally community in character between decedent and herself but which decedent had converted to joint tenancy property prior to the settlement of income taxes thereon.

Petitioner contends that the joint tenancy estate of John E. Burrell and Arley M. Burrell at the time of decedent's death included funds as a result of the conversion in the aforesaid manner of which \$10,344.12 had been contributed by Arley M. Burrell, by her assumption of the taxes and later payment thereof and should therefore be excluded from decedent's gross estate as the contribution of the surviving tenant.

The Commissioner of Internal Revenue held that Arley M. Burrell, surviving tenant, made no contribution to the jointly-owned property of John E. Burrell and Arley M. Burrell.

III.

The Estate of John E. Burrell, deceased, Arley M. [34] Burrell, executrix, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Court, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

IV.

Assignments of Error

The petitioner assigns as error the following acts and omissions of The Tax Court of the United States:

1. The holding that the question presented to the Court was solely “—whether the Commissioner erred in disallowing a deduction of \$10,344.12 from the decedent’s gross estate.”

2. The failure to determine that Arley M. Burrell had made a contribution in the sum of \$10,344.12 to the jointly-owned property of John E. Burrell and Arley M. Burrell.

3. The failure to find that the extent of the interest of the decedent in the jointly-owned property subject to estate taxes was \$99,803.75, being the total of the jointly-owned property in the amount of \$110,147.87 less the contribution of \$10,344.12 by Arley M. Burrell. [35]

4. The failure to find that the gross estate of the decedent subject to estate taxes amounted to \$123,791.48.

5. The holding that the “actual net worth of the decedent’s estate—was \$134,135.60.”

6. The failure to find there was under California statutes relative to community property and contractual relations of a husband and wife residing in California at least a presumption the wife acts under the husband’s direction when she signs and files a separate income tax return reporting one-half of the community income of her husband.

7. The finding of a deficiency in the estate tax

of decedent's estate in the amount of \$2,199.80, in lieu of a determination that the estate owes no additional estate taxes.

/s/ F. T. RITTER,
Attorney,
Counsel for Petitioner.

(Duly Verified.)

[Endorsed]: Filed July 6, 1948. [36]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner on Review,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

NOTICE OF FILING PETITION FOR
REVIEW

To Charles Oliphant, Chief Counsel, Bureau of Internal Revenue.

You are hereby notified that the above petitioner did, on the 6th day of July, 1948, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of this Court heretofore ren-

dered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 8th day of July, 1948.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

Service of copy of Petition for Review acknowledged this July 8, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue,
Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed July 8, 1948. [38]

The Tax Court of the United States
Docket No. 11886

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Cir-

cuit Court of Appeals for the Ninth Circuit, with reference to petition for review hertofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court of the United States, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

3. The findings of fact and opinion of the Tax Court of the United States.

4. The decision of the Court.

5. The petition for review, filed by the petitioner in the above cause.

6. This Praecipe.

/s/ F. T. RITTER,

Attorney for Petitioner.

Personal service of the foregoing Praecipe for Record is hereby acknowledged this 21st day of July, 1948. No counter-praecipe will be filed.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of

Internal Revenue,

Counsel for Respondent.

[Endorsed]: Filed July 22, 1948. [39]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 39, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 22nd day of July, 1948.

Last day to file record is August 15, 1948.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

[Endorsed]: No. 12011. United States Court of Appeals for the Ninth Circuit. Estate of John E. Burrell, Deceased, Arley M. Burrell, Executrix, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed August 4, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12011

ESTATE OF JOHN E. BURRELL, Deceased,
ARLEY M. BURRELL, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON WHICH PETI-
TIONER INTENDS TO RELY ON APPEAL

Petitioner hereby adopts as his points on appeal
the assignments of error included in the petition
for review within the transcript of record.

/s/ F. T. RITTER,
Counsel for Petitioner.

(Acknowledgment of Service attached.)

[Endorsed]: Filed August 23, 1948. Paul P.
O'Brien, Clerk.

No. 12011.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF JOHN E. BURRELL, Deceased, ARLEY M. BURRELL, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court
of the United States.

PETITIONER'S OPENING BRIEF.

F. T. RITTER,
605 Jergins Trust Building, Long Beach 2.
Counsel for Petitioner.

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No. 12011.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF JOHN E. BURRELL, Deceased, ARLEY M. BURRELL, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Opinion Below.

The opinion of the Tax Court is a Memorandum Decision and is reported at Par. 48,051 P-H Memo T. C.

Jurisdiction.

The petition herein is to review the decision of the Tax Court of the United States involving petitioner's estate tax return.

The jurisdiction of the Tax Court is based upon Section 871(a) of the Internal Revenue Code. The jurisdiction of this Court is based upon Sections 1141 and 1142 of the Internal Revenue Code.

Petitioner's Federal estate tax return indicating an assessment of \$6,408.18 was filed with the Collector of

Internal Revenue for the Sixth District of California, at Los Angeles, September 15, 1944. Respondent determined a deficiency in petitioner's estate tax in the amount of \$2,199.80, and notified petitioner of this deficiency under date of May 29, 1946 [R. 10]. Petition for redetermination was filed with the Tax Court on August 26, 1946 [R. 20].

The Tax Court (per Disney, Judge) promulgated its Memorandum Findings of Fact and Opinion on April 6, 1948 [R. 22]. The Decision of the Tax Court, pursuant to said Findings of Fact and Opinion, that there is a deficiency in estate taxes in the amount of \$2,199.80 was entered on April 7, 1948 [R. 30]. Petitioner's petition for review was filed on July 6, 1948 [R. 30].

Question Presented.

Has a wife who is a surviving joint tenant of her deceased husband in a community property state made a contribution to the jointly owned property of the spouses to the extent of community income taxes paid by her where the jointly owned property is traceable to the husband's earnings but the gross amount of the property in the estate at the date of death is accounted for by the fact that community income taxes on his earnings remained to be paid, and half of such taxes were required to be paid by the wife from her separate property after his death as a result of her having filed a separate income tax return under the husband's direction on half of her husband's community earnings?

Statutes and Regulations Involved.

The statutes and regulations involved are as follows:

Internal Revenue Code, Sec. 811(e)(1);

Civil Code of California, Secs. 161(a), and 171.

These statutory provisions and regulations are set forth in the Appendix hereto.

Statement of the Case.

This appeal is solely upon the conclusions of law reached by the Tax Court of the United States.

The controversy involved in this review concerns the petitioner's estate tax. Decedent John E. Burrell died July 28, 1943, a resident of California. His estate tax return to the United States was duly filed by his widow and executrix of his estate, Arley M. Burrell, with the Collector of Internal Revenue, at Los Angeles. Thereafter, the Commissioner of Internal Revenue assessed additional estate taxes against the estate based on disallowance of income taxes on community income of decedent during his lifetime, which were unpaid at the time of his death, to the extent that they were assessed against his wife, Arley M. Burrell. Mrs. Burrell had no separate income but had signed community income tax returns reporting one-half of her husband's income, as is customary in community property states.

The proceeding before the Tax Court of the United States was brought on the alleged error of the Commissioner, among others, in failing to hold that the income taxes remaining to be paid at the time of death by the

wife on the earnings of the decedent were, if not technically allowable as deductions, at least contributions by the wife to the jointly owned property in the name of herself and her husband. John E. Burrell had made a practice of depositing his earnings, which were entirely community, into joint tenancy bank accounts as he withdrew them from his business and, at the time of his death, 85% of his estate was in the form of joint tenancy with his wife, Arley M. Burrell. If the income taxes remaining to be paid by Arley M. Burrell were contributions to the joint tenancy, the interest of the decedent in the joint tenancy property subject to estate tax would be reduced in a like amount.

The Tax Court of the United States decided this issue in favor of the Commissioner April 7, 1948, upon the authority of the *Estate of Benjamin Franklin McGrew*, 46 B. T. A. 623 (decided March 13, 1942), and *Fox v. Rothensies*, 115 F. 2d 42 (C. C. A. 3, decided September 30, 1940). The decision of the Tax Court of the United States is in effect that the payment of the tax by the wife does not constitute an adequate consideration for a claim against or contribution to the estate and, in any event, there was no express or implied contract with the husband for repayment.

The ruling of the Tax Court of the United States in this case is novel and has not been heretofore reviewed by the Circuit Courts.

Specification of Errors Relied Upon.

The points petitioner intends to rely upon on review are as follows:

1. The holding that the question presented to the Court was solely “. . . whether the Commissioner erred in disallowing a deduction of \$10,344.12 from the decedent's gross estate.”

2. The failure to determine that Arley M. Burrell had made a contribution in the sum of \$10,344.12 to the jointly-owned property of John E. Burrell and Arley M. Burrell.

3. The failure to find that the extent of the interest of the decedent in the jointly-owned property subject to estate taxes was \$99,803.75, being the total of the jointly-owned property in the amount of \$110,147.87 less the contribution of \$10,344.12 by Arley M. Burrell. (35)

4. The failure to find that the gross estate of the decedent subject to estate taxes amounted to \$123,791.48.

5. The holding that the “actual net worth of the decedent's estate—was \$134,135.60.”

6. The failure to find there was under California statutes relative to community property and contractual relations of a husband and wife residing in California at least a presumption the wife acts under the husband's direction when she signs and files a separate income tax return reporting one-half of the community income of her husband.

7. The finding of a deficiency in the estate tax of decedent's estate in the amount of \$2,199.80, in lieu of a determination that the estate owes no additional estate taxes.

Summary of Petitioner's Argument.

Petitioner relies on the principle of justice and equity that it is the intent of the Congress to tax the transfer of the true net estate of a decedent. The applicable revenue statutes accomplish this by excluding from the gross jointly-owned estate, if any there be, contributions by the surviving tenant, as well as by allowing deductions from the gross estate for personal debts of the decedent.

Petitioner argues on the factual side that where money or property in an estate can be traced directly to earnings of the decedent on which the income taxes were not fully paid, the estate should be reduced by the amount of the unpaid income taxes. Where the decedent was a married man in a community property state, the foregoing statement should be equally true even though he elected to file separate income tax returns with his wife on his community earnings.

Where the community earnings of the husband prior to his death were converted to jointly-owned property, the true contribution of the husband to the jointly-owned property could not exceed the amount of the earnings less the income taxes thereon. If the amount in the jointly-owned estate exceeds the tax-paid earnings by a sum equal to and traceable to the assumption and payment of the income taxes by the wife and surviving tenant, such sum is the contribution of the wife.

The payment in money of the income tax by the wife on decedent's earnings is a consideration in money's worth from which the estate received a benefit.

The conduct of the husband during his lifetime clearly shows he did not intend the wife to deplete her separate estate when he directed her to file a separate return reporting half of his community earnings. There was no obligation on her under the revenue acts to file such a return, and it should be presumed she acted under the husband's direction in doing so, since he had full control and management of the community property affairs. There is, under California statutes, an implied contract the community will reimburse the wife for outlays from her estate on behalf of the community for other than necessities of life, there being no donative intent on her part.

ARGUMENT.

I.

There Is an Unjust Enrichment of the Decedent's Estate Unless the Wife's Payment of Community Income Taxes on Decedent's Earnings Is Determined to Be a Contribution to the Joint-Tenancy Property Into Which the Decedent Put His Earnings.

The Tax Court determined the gross estate of the decedent to be the sum of \$134,135.60 and to consist of the following types of property [R. 24]:

Community property	
Stocks and bonds	\$ 60.00
Insurance	6,827.25
Property used in decedent's business	17,100.48
	<hr/> \$ 23,987.73
Jointly owned property	110,147.87
	<hr/>
Total	\$134,135.60
	=====

It also determined that there were owing by the husband and wife, at the time of decedent's death on July 28, 1943, federal and state income taxes on joint and community earnings as follows [R. 24]:

Husband, John E. Burrell

Federal income taxes year 1941	\$ 166.00
Federal income taxes year 1942	9,122.54
California income taxes year	
1942	1,055.58
	\$10,344.12
	=====

Wife, Arley M. Burrell

Federal income taxes year 1941	\$ 166.00
Federal income taxes year 1942	9,122.54
California income taxes year	
1942	1,055.58
	\$10,344.12
	=====

It is an equitable principle that the decedent's true estate which could be transferred to a beneficiary is the same whether his 1942 income taxes were paid on March 15, 1943, or whether they were deferred under the installment basis. The Tax Collector would collect the income taxes before distribution and the distributable estate would be the same in either case. The variation from this principle in the Tax Court's determination is shown by the following schedule:

1. Decedent's gross estate on basis of 1942 com- munity income taxes of s p o u s e s b e i n g p a i d March 15, 1943	Community Property	Jointly Owned Property	Total
Investment in con- tracting business, etc.	\$23,987.73	\$ 0	\$ 23,987.73
Accumulation of earn- ings after taxes	0	89,459.63	89,459.63
2. Total of estate if dece- dent had paid the 1942 c o m m u n i t y i n c o m e taxes March 15, 1943	\$23,987.73	\$ 89,459.63	\$113,447.36
3. Unpaid community in- come taxes of decedent at date of death. (Tax Court allows to the es- tate an offsetting de- duction for these taxes.)	0	10,344.12	10,344.12
4. True gross estate at date of death per petitioner	\$23,987.73	\$ 99,803.75	\$123,791.48
5. Unpaid community in- come taxes of dece- dent's wife at date of death of d e c e d e n t. These taxes were paid by the wife from sepa- rate property. (T a x Court does <i>not</i> allow to the estate an off- setting deduction for these taxes.)	0	10,344.12	10,344.12
6. Estate as determined by Tax Court	<u>\$23,987.73</u>	<u>\$110,147.87</u>	<u>\$134,135.60</u>

It will be seen from the foregoing summary that the true estate of the decedent after the payment of the community income taxes is \$113,447.36 (item 2). It is also clear that the determination of the Tax Court of a gross

estate of \$134,135.60 does not achieve an equitable result when concurrently with such determination it allows but one of the spouses' income taxes as a proper deduction therefrom. This has the effect of enlarging the taxable estate of the decedent for estate tax purposes by the sum of \$10,344.12, which is added to the estate by the respondent and enters into the basis for the deficiency assessment.

The essence of the wife's payment of half the income taxes which were unpaid at the date of death is that it represents a purchase of assets which remained in the estate in the name of joint tenants. The recognition of this purchase on her part as a contribution to the jointly-owned property reduces the decedent's interest in the jointly-owned properties for estate tax purposes as intended by Congress. When the surviving tenant takes the jointly-owned property after the decedent's death, the amount of her purchase or contribution should be returned to her free of estate tax to achieve an equitable result. This is accomplished by fixing the gross estate of the decedent at the sum of \$123,791.48 (item 4). The consistency thereof is as follows:

Community property	
Stocks and bonds	\$ 60.00
Insurance	6,827.25
Property used in decedent's business	17,100.48
	—————\$ 23,987.73
Jointly-owned property	99,803.75
	—————
Total	\$123,791.48
	=====

II.

There Was an Implied Contract From the Husband's Conduct That the Funds of the Community Estate Would Pay for the Wife the Taxes Assessed on Her Community Income Tax Return.

Section 811(e)(1) of the Internal Revenue Code, as amended by the Revenue Act of 1942, provided for the exclusion from the jointly owned interests of a deceased husband of any amount contributed by the surviving tenant or wife to the jointly owned estate providing such amount had not been acquired originally by the surviving wife from her husband for less than an adequate consideration in money or money's worth. The petitioner's contention is that the income taxes on the community income left to be paid by the wife after the death of the husband and which the Tax Court found were paid by her in the regular course after the husband's death [R. 25] were contributions to the joint tenancy estate. The Tax Court held that this theory was not tenable on the ground that there was no express or implied promise by John E. Burrell that the community estate would bear the burden of paying these taxes of his wife [R. 28].

The Tax Court found:

"The decedent and his wife filed separate tax returns in the State of California on their respective shares of joint and community income for the years 1941, 1942 and 1943." [R. 24.]

It also found:

"Decedent and his wife, Arley M. Burrell, converted their property into joint tenancy during their

marriage, except the portion of their property used in decedent's business," [R. 23],

And,

"That the estate tax return included among assets of the estate bank accounts held in joint tenancy by the decedent and his wife, totaling approximately \$40,000.00." [R. 25.]

It is apparent from these findings that John E. Burrell did provide the means whereby his wife could pay her share of the community income taxes from funds originally community in character by placing the funds in joint-tenancy bank accounts. The intention on his part to pay the wife's taxes had become a fact since the joint-tenancy bank accounts were at her disposal. It is clear he intended her estate to suffer no injury. The husband's conduct during life clearly shows that he recognized his wife should be protected from a personal liability in respect to the community income tax returns filed by her.

In holding there was no evidence that the wife expected protection or repayment from John E. Burrell or the community estate for the payment of the community income taxes, the Tax Court overlooked these salient acts of John E. Burrell during his lifetime and relied upon its own holding in the *Estate of Benjamin Franklin McGrew*, 46 B. T. A. 623, decided March 13, 1942, and *Fox v. Rothensies*, 115 F. 2d 42, C. C. A. 3, decided September 30, 1940. In both of these cases, there were transactions quite foreign to that of the Burrells. There the marital

domiciles were in non-community property states and the husbands and wives were owners of separate property prior to their marriages. During the marriages, properties of the husbands and wives were substantially commingled over a series of years. There were transfers of property from the husbands to the wives for which no accountings were made by the spouses during lifetime. The evidence relative to the transactions behind the transfers was oral and the vagueness of the facts inclined the courts to conclude that the exchanges of properties between the spouses were not on a business basis. The direct testimony of the wives was to the effect that reimbursement for advances was not expected from the husbands.

In the *Burrell* case, there is one single type of transaction between the husband and wife, the filing and payment of community income tax returns for 1941 and 1942. The Tax Court held that there were no statutory gifts between the Burrells [R. 24], and it is clear that Mrs. Burrell had no separate property interests during her lifetime which she could have used to pay her income taxes. It was incumbent upon the husband to provide means for her to pay the taxes which he did through the creation of the joint-tenancy bank accounts.

From a review of the decided cases where the wives had claimed contributions to their joint-tenancy estates with their husbands, it is apparent that the decisions of the courts have turned on two points: first, whether the contributions were clearly provable, and, secondly, whether

transactions between the spouses in their property matters were conducted on a businesslike basis. In *Richardson v. Helvering*, 85 Cal. 2d 548 (C. C. A., decided December 2, 1935), the Court held the wife had made a contribution in money or money's worth to the jointly owned property in view of the fact the transactions were clear, and a business basis existed in the transactions between the husband and wife. The Court there cited *Stickney v. Stickney*, 131 U. S. 227, 9 S. Ct. 677, 33 L. Ed. 136, to the effect that in the absence of direct evidence, the wife intended a gift, wherever a husband acquired possession of the separate property of his wife, either with or without her consent, he must be deemed to hold it in trust for her benefit. *McCrady v. Heiner* (D. C., W. D. Pa.), 19 Fed. Supp. 575, decided May 3, 1937, is to the same effect as *Richardson v. Helvering*, *supra*. Likewise, *Bremer v. Luff* (D. C., N. D. N. Y.), 7 Fed. Supp. 148, decided October 21, 1923, where the husband and wife had jointly signed mortgage indebtedness given to purchase property.

One can think of few expenses of living more related to business in character than income taxes. They spring in fact from business. Personal transactions are carefully eliminated from their computations. The payment of income taxes on community income is the only transaction involved in the instant case. There is no sound reason to assume the wife intended to pay any portion of these community income taxes with funds other than provided by the community estate. The fact that the wife had no separate estate makes this conclusion abundantly clear.

III.

There Is an Implied Contract Under California Law That the Community Will Pay for the Wife the Tax Assessed on Her Community Income Tax Return or, in the Alternative, Reimburse Her for Payment Thereof.

As is well known, California is a community property state. Section 161a of the Civil Code, State of California, provides that interests of the husband and wife in community property are present, existing and equal interests under the *management and control of the husband*. Since the payment of income taxes on community income is part of the management of the community estate over which the husband is given control, it is a natural presumption the wife acts under his direction in filing an income tax return for half the community income.

Section 171 of the California Civil Code provides the separate property of the wife is not liable for the husband's debts, but is liable for the *necessaries of life* while husband and wife live together. In *Grolemund v. Caf-ferata*, 17 Cal. 2d 679, at 688 (1941), Judge Curtis states:

“A complete reading of all our code sections on community property clearly demonstrates that our community system is based on the principle that all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property . . .”

It is clear from these sections that while the husband has dominion over the community estate, the community estate or the husband's estate must take care of the community expenses of the spouses. Unless intended by her

as gifts, the wife has an actionable claim against the community for any expenditures for the community from her separate estate, other than the necessities of life. Respondent waived examination of Arley M. Burrell at the hearing before the Tax Court, and the Tax Court made no finding she intended a gift when she filed the community income returns in her name, or when she later paid the tax. Clearly, the community income tax obligations derive from the community income and should be defrayed by the community estate. Here again, the evidence is clear and specific as to what community income taxes were paid by Arley M. Burrell and when. She has a just claim for recovery from the community estate for the payment of community income taxes by her.

IV.

Payment by the Wife of Community Income Taxes Is an Adequate Consideration in Money's Worth to Support the Theory of a Contribution by Her to the Joint-Tenancy Estate of the Spouses Into Which the Husband Put His Earnings.

The death of John E. Burrell on July 28, 1943, terminated the joint-tenancy holdings of himself and his wife, Arley M. Burrell. After his death, these properties became the separate property of the surviving wife, Arley M. Burrell.

The community income taxes of the spouses were obligations in money determined by the Commissioner as of March 15, 1943, approximately *four months prior* to the decedent's death. It is with money that Arley M. Bur-

rell paid the amount of \$10,344.12, representing community income taxes, assessed against her for the benefit of the community. This payment was made after the death of the decedent out of her separate estate. She relies upon this fact as being a matter of substance sufficient to be a contribution to the jointly owned properties of the spouses. Surely the substance of it should not be raised by the Commissioner whom the Tax Court held received the money.

The gross estate of the decedent, being limited to his contributions to the joint tenancy properties, amounts therefore to \$123,791.48.

Conclusion.

In conclusion, then, it is clear that the interest of the decedent in the jointly owned property, being limited to his contributions, amounts to \$99,803.75, and that the gross estate of the decedent amounts to \$123,791.48. The consistency thereof is as follows:

Community property	
Stocks and bonds	\$ 60.00
Insurance	6,827.25
Property used in decedent's business	17,100.48
	—————\$ 23,987.73
Jointly owned property	99,803.75
	—————
Total	\$123,791.48
	=====

The petition for review should therefore be granted, and the decision of the Tax Court reversed and the case remanded to the Tax Court with instructions to enter judgment for the petitioner consistent with Section 322(d) of the Internal Revenue Code.

Respectfully submitted,

F. T. RITTER,

Counsel for Petitioner.

Long Beach, California, October 15, 1948.

APPENDIX.

Statutes and Regulations Involved.

Internal Revenue Code:

Section 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(e) Joint and Community Interests.—

(1) Joint Interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift,

bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

Civil Code of California:

Section 161a.—Community Property.

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests *under the management and control of the husband* as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Section 171.—Separate Property of Wife Exempt from Husband's Debts.

The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage.

No. 12011

**In the United States Court of Appeals
for the Ninth Circuit**

ESTATE OF JOHN E. BURRELL, DECEASED, ARLEY M.
BURRELL, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

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FILED

1948

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COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 22-29) are not officially reported.

JURISDICTION

The petition for review (R. 30-34) involves federal estate taxes for the year 1943. On May 29, 1946, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in the total amount of \$2,199.80. (R. 10-14.) Within 90 days thereafter, and on August 26, 1946, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 871 (a) of the Internal Revenue Code. (R. 3-20.) The decision of the Tax

Court sustaining the deficiency was entered on April 7, 1948. (R. 30.) The case is brought to this Court by a petition for review filed July 6, 1948 (R. 30-34), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Did the Tax Court correctly determine that the value of all property held by decedent and his wife as joint tenants should be included in the gross estate of decedent, where taxpayer failed to prove the applicability of the exception in Section 811 (e) (1) of the Internal Revenue Code?

STATUTE AND REGULATIONS INVOLVED

The applicable statute and Regulations are set forth in the Appendix, *infra*.

STATEMENT

The undisputed facts as found by the Tax Court (R. 23-25) are as follows:

The petitioner is the Estate of John E. Burrell, deceased, who died July 28, 1943, a resident of California. Arley M. Burrell is the duly appointed executrix. The estate tax return was filed with the Collector of Internal Revenue for the Sixth District of California. (R. 23.)

The decedent, John E. Burrell, and Arley M. Burrell were husband and wife, and they resided in the State of California as husband and wife for 30 years prior to decedent's death. (R. 23.)

The decedent was engaged in the general contracting business throughout his married life and his income therefrom was community income. All the properties in the estate of decedent and his widow were derived from the earnings of decedent during their marriage. (R. 23.)

Decedent and his wife, Arley M. Burrell, converted their property into joint tenancy during their marriage, except the portion of their property used in decedent's business. Decedent's gross estate was returned for estate tax purposes as follows (after audit) (R. 23-24) :

Stock and bonds.....	\$	60.00
Insurance		6,827.25
Jointly-owned property.....		110,147.87
Other property (property used in decedent's business).....		17,100.48
		<hr/>
		\$134,135.60

The foregoing list of property constituted all the property accumulated by decedent and his wife during their married life. (R. 24.)

The total deductions claimed on the return amounted to \$29,395.73 (after audit), and included in addition to debts, funeral and administrative expenses, federal and state income taxes assessed prior to the death of decedent, as follows (R. 24) :

	Federal Income Taxes Year 1941	Federal Income Taxes Year 1942	California Income Taxes Year 1942
John E. Burrell, husband....	\$166.00	\$9,122.54	\$1,055.58
Arley M. Burrell, wife.....	166.00	9,122.54	1,055.58

The value at the date of decedent's death of property subject to claims was \$17,160.48. (R. 24.)

The decedent and his wife filed separate income tax returns with the federal government and the State of California on their respective shares of joint and community income for the years 1941, 1942, and 1943. There were no statutory gifts between the decedent and his wife during decedent's lifetime. (R. 24.)

All the valuations determined by the Commissioner in the estate are correct. The deductions, as determined

by the Commissioner, apart from the issue of deductibility, are correct. (R. 25.)

The estate tax return included among assets of the estate bank accounts held in joint tenancy by the decedent and his wife totaling approximately \$40,000. The separate income tax return of the decedent's wife for the year 1942 referred to the income reported as community income and reported a tax of \$18,245.06. Her return for the year 1943 showed a tax of \$119.36. After the death of the decedent she paid all claims against the estate, and paid a total of \$10,344.12 state and federal income taxes for herself for 1941, 1942, and 1943, the amount being included in payments of \$4,561.26 on each of the following dates: March 15, 1943; June 15, 1943, September 15, 1943, and December 15, 1943. The actual net worth of the decedent's estate and the amount determined by the Commissioner was \$134,135.60. Claims were filed against the estate in the total amount of \$29,395.73. Of that amount, the Commissioner, in determining the net estate, allowed \$17,160.48, disallowing \$1,891.13 of claims itemized as "Debts other than income taxes," and disallowing \$10,344.12, the amount of income taxes of the decedent's wife, Arley M. Burrell. (R. 25.)

SUMMARY OF ARGUMENT

Under Section 811(e) of the Internal Revenue Code, the value of all property held by decedent and any other person as joint tenants must be included in the gross estate of decedent except for any portion of the jointly held property which originally belonged to the other person and was not obtained from decedent for less than full and adequate consideration in money or money's worth. The filing of separate returns and the payment by decedent's wife of her own share of the community and joint income taxes was simply a payment of her own obligation, and did not constitute a

contribution to the joint estate. Moreover, taxpayer failed to prove that the payment was made with funds which originally belonged to decedent's wife. Finally, and most important, even if decedent's wife had transferred to her husband something of value which originally belonged to her, this would not constitute consideration for any portion of the joint estate in the absence of proof that the payment was made with the expectation of repayment, and that some portion of the jointly held property represented a liquidation of a promise by decedent to repay. Since the taxpayer failed to sustain the burden of bringing the estate within the exception of Section 811(e)(1), the Tax Court's decision should be sustained and all property held by decedent and his wife as joint tenants must be included in the gross estate.

ARGUMENT

I

The Tax Court correctly determined that all property held by decedent and his wife as joint tenants must be included in decedent's gross estate under Section 811 (e) of the Internal Revenue Code

Section 811 (e) (1) (Appendix, *infra*) provides for the inclusion in the gross estate of the value of all property held as joint tenants by the decedent and any other person—

* * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth * * *.

The undisputed facts disclose that decedent's wife never had any separate property, and that no specific property in decedent's estate had "originally belonged" to her. The taxpayer proposes, however, a theory so

vague and tenuous as to be patently untenable under Section 811 (e) (1) even on cursory examination. Taxpayer argues that the wife incurred a personal liability on behalf of the community by filing separate income tax returns on her own share of the community and joint income with the consequence that a separate property interest in the estate was created in her favor; and that she was a contributor to the joint tenancy by virtue of the conversion of the community property to jointly held property and by virtue of her payment of her share of the income taxes. As the Tax Court indicated, the theory is interesting, principally because it is novel, but it is without substance.

First, the wife contributed neither to the joint estate nor to her husband. Certainly no contribution emanated from her by virtue of the conversion of the community property to jointly held property. If anything, the wife's rights were increased thereby. Nor can she be said to have made a contribution by paying her own income taxes. Since she filed separate returns, she was merely paying her own obligations. This is especially true since the income was both community and joint. It cannot be said that a wife who reaps the benefit of community and joint earnings is contributing to another person when she files a separate return and pays her own share of the tax. Indeed it is clear that legally the obligation was her own, since she filed separate returns. Taxpayer argues that the wife filed separate returns at the direction of her husband; this despite the fact that there is not a shred of evidence in the record to support the statement. Nor can we agree that it is a "natural presumption" that she filed separate returns at his direction. (Pet. Br. 15.) Such "presumption" might conceivably exist if the transaction viewed as a whole appeared to be calculated to benefit the husband. At any rate the burden of proof rested on taxpayer to

overcome the legal presumption in favor of the validity of the Commissioner's determination, and this burden cannot be sustained by conjecture.

Secondly, assuming that the wife could be said to have transferred something of value to her husband or to the joint estate, taxpayer would still have failed to prove that the wife transferred something which "originally belonged" to her. The wife had no separate property. All of the property held jointly by her and decedent was traceable to community property earned by decedent. Treasury Regulations 105, Sec. 81.22 (Appendix, *infra*) provides—

For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence.

Moreover, the record does not disclose whether she paid the taxes out of income originally earned by the husband before or after July 29, 1927. Income earned prior to that date would in any case be treated as the separate property of the husband with the wife's hav-

ing only a contingent interest in the community property. *United States v. Robinson*, 269 U. S. 315; Civil Code of California (1937), Secs. 161, 162, 163, 164, 687. For this reason, it had been held that where property was acquired by decedent and his wife with community property, this did not establish that any part of such property originally belonged to her within the meaning of Section 302 (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253, so as to justify the exclusion of any part of it from the husband's estate. *Melzer v. Commissioner*, 23 B. T. A. 124. More recently the Court of Claims held that where money held in joint bank accounts by husband and wife was utilized to pay insurance premiums on policies on the husband's life, all of the proceeds of the policies were included in his gross estate since the taxpayer had "not sustained the burden * * * of proving that the insurance premiums were paid out of community funds acquired after July 29, 1927". *Rule v. United States*, 63 F. Supp. 351, 358 (C. Cls., 1945). Thus it is clear that taxpayer did not sustain the burden of proving that the wife had paid the taxes out of funds originally belonging to her.

Finally and most important, even had the wife transferred to her husband something of value originally belonging to her, this would not constitute a consideration for any share of the jointly held property unless the payments were in the nature of loans to the husband accompanied by a promise of repayment. *McGrew's Estate v. Commissioner*, 135 F. 2d 158 (C.C.A. 6th). In the *McGrew* case, the wife had previously advanced substantial sums of money to assist her husband in meeting his obligations. Subsequently the husband transferred to his wife a sum of money which she placed in a ^{5.9.44} joint savings account. The Court of Appeals, emphasizing that the burden of proof rested on the taxpayer to bring the estate within the exception

contained in Section 811 (e) (1) of the Internal Revenue Code, upheld the determination of the Board of Tax Appeals that the funds deposited in the joint savings account had not been proved to have been received (p. 162) "in fulfillment of a promise or expectation of repayment of advances made by her to him, or 'for anything else approaching an adequate and full consideration in money or money's worth' ". See also *Fox v. Rothensies*, 115 F. 2d 42 (C.C.A. 3d).

As the Tax Court pointed out in this case, no evidence was introduced by the taxpayer tending to show that decedent's wife expected to be reimbursed for the sum she expended in payment of her income taxes, or that any portion of the jointly held property represents a liquidation of a promise by decedent to repay his wife. Taxpayer argues that the Tax Court overlooked certain "salient" facts in this connection. These facts as set out by the taxpayer (Br. 11, 12) are that decedent and his wife filed separate tax returns on their respective shares of joint and community income, that decedent and his wife converted all community property into joint tenancy with the exception of property used in decedent's business, and that the estate tax return included among the assets joint bank accounts totalling \$40,000. From these facts taxpayer reasons that the husband provided the means for his wife to pay her taxes by establishing joint accounts, that he intended her estate to suffer no injury, that his generous conduct showed that he didn't intend her to assume a personal liability, and therefore he intended to reimburse her for any taxes paid by her. Needless to point out, there is serious question as to whether taxpayer's conclusions follow from the purportedly "salient" facts. At any rate this highly conjectural type of reasoning would hardly suffice to sustain taxpayer's burden of proving that the decedent intended to reimburse his

wife for her payment of her income taxes or that any portion of the property held jointly by decedent and wife represented a liquidation of a promise by decedent to repay his wife.

Nor is there any merit in the contention that there was an implied contract that the estate would reimburse the wife for payment of her taxes on her own share of community and joint income. Taxpayer cites no authority for the proposition and the sections of the California Code relied upon do not support the contention. It is not conceivable that it would be held that a wife who files separate returns and pays taxes on her own share of joint and community income would in every case be entitled as a matter of law to reimbursement. Under Section 811 (e) (1) the burden is with taxpayer to prove that the wife paid the taxes with the expectation of being repaid and that a portion of the property jointly held represents a liquidation of the promise to repay; in other words taxpayer must prove that the payment of taxes by the wife was intended to be a consideration for an interest in the jointly held property. As previously noted taxpayer introduced no evidence in this connection.

Assuming it be true that the wife has a claim against the estate, a fact which seems very doubtful, nonetheless this would not affect the estate tax liability since it is clear that claims have already been allowed to the full extent that there was property available subject to claim. (R. 24, 25.) See Section 812 (b) (5) of the Internal Revenue Code (Appendix, *infra*).

II

Taxpayer is not entitled to exclude from the estate any portion of the property held jointly by decedent and his wife on any theory of unjust enrichment or any other equitable theory

Taxpayer argues under heading I (Br. 7-10) that decedent's estate was unjustly enriched by virtue of the

fact that all of the jointly held property was included in the estate whereas decedent's wife paid the already accrued income taxes on her share of the community and joint income. Taxpayer further argues that it is inequitable to include in the gross estate the entire value of jointly owned property without allowing an exclusion in the amount of income taxes paid by decedent's wife. Even if it were true that the estate were "unjustly enriched" and that it would be "inequitable" to disallow an exclusion in the amount of the wife's taxes, the argument would have no validity. Section 811 (e) clearly provides for the inclusion in the gross estate of the value of all property held by decedent and another person as joint tenants. The only exception is that specifically provided in subsection (1) namely:

* * * such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth
* * *.

As the Supreme Court pointed out in *United States v. Jacobs*, 306 U. S. 363, 371—

It is immaterial that Congress chose to measure the amount of the tax by a percentage of the total value of the property, rather than by a part, or by a set sum for each such change. The wisdom both of the tax and of its measurement was for Congress to determine.

It has been held on many occasions that all property held by decedent and his wife as joint tenants must be included in his gross estate in the absence of proof that any part of the property belonged originally to the wife and was never acquired by her from decedent for less than an adequate consideration in money or money's

worth, and that she did not receive from decedent the consideration with which she acquired her part of the property. *Foster v. Commissioner*, 90 F. 2d 486 (C.C.A. 9th). Taxpayer here in effect attempts to establish new standards for the measurement of the estate tax and to broaden the exception specifically provided in Section 811 (e) (1).

CONCLUSION

The value of all property held by the decedent and his wife as joint tenants must be included in his gross estate since taxpayer has failed to sustain the burden of proving the applicability of the exception in Section 811 (e) (1). The judgment of the Tax Court should be affirmed.

Respectfully submitted,

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NOVEMBER, 1948

APPENDIX

INTERNAL REVENUE CODE:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

*

*

*

(e) [As amended by Sec. 402(b) (1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Joint and Community Interests.*—

(1) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests

are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(26 U. S. C. 1946 ed., Sec. 811.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(b) *Expenses, Losses, Indebtedness, and Taxes.*
—Such amounts—

* * *

(5) [As amended by Sec. 405(a) of the Revenue Act of 1942, *supra*] * * * There shall be disallowed the amount by which the deduction specified in paragraphs (1), (2), (3), (4), and (5) exceed the value, at the time of the decedent's death, of property subject to claims. * * *

(26 U. S. C., 1946 ed., Sec. 812.)

TREASURY REGULATIONS 105, promulgated under the Internal Revenue Code:

SEC. 81.22 [As amended by T. D. 5239, 1943 Cum. Bull. 1081.] *Property held jointly or by the entirety.* The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or

acquired it by gift, bequest, devise, or inheritance. Section 811(e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right of survivorship and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

The entire property is *prima facie* a part of the decedent's gross estate. But it is not the intent of the statute that there should so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner should neither have parted with any consideration in its acquirement. Facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate. (2) If the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) If the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than an adequate and full consideration in money or money's

worth, then such portion of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) If the property was acquired by the decedent and his or her surviving spouse as tenants by the entirety by gift, bequest, devise, or inheritance, then only one-half of the property becomes a part of the gross estate. (5) If the property was acquired by the decedent and the other joint owner as joint tenants by gift, bequest, devise, or inheritance, and their interests are not otherwise specified or fixed by law, then only one-half of the property is a part of the gross estate; or, if so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall be deemed the owners of equal fractional parts, and one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) If the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) if the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) if the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire property should be included; (d) if the other joint owner, prior to the acquirement of the property, received from the decedent, for less than an adequate and full consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) if the decedent fur-

nished no part of the purchase price, no part of the property should be included; (f) if the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the property should be included.

For the purposes of the estate tax, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

No. 12013

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH BARSOCK,

Appellant and Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent and Plaintiff.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Appellant, a 22-year-old Negro, was convicted of the murder of Naval Chief Petty Officer Jepson at the Naval Reservation, Long Beach, California, committed during the early morning hours of April 3, 1948. Jurisdiction was acquired by the District Court under the indictment filed by the Grand Jury pursuant to Title 18, U. S. C. A., Sections 451 and 452. He was convicted of murder in the first degree under Count I of the indictment [Clk. Tr. p. 2], and sentenced to life imprisonment [Clk. Tr. p. 27]. He filed his Notice of Appeal to this court [Clk. Tr. p. 31], it having appellate jurisdiction since the punishment was other than death (18 U. S. C. A. 681, and 28 U. S. C. A. 1291).

Two specifications of error are relied upon, the first being that the defendant was the subject of an illegal arrest and detention at the time of the killing, and hence the homicide was manslaughter rather than murder in the

first degree, and that the court erred in instructing the jury that the legality of the arrest or custody was immaterial. Secondly, defendant was placed in jeopardy, upon the empaneling of the jury, for murder in two counts, Count I charging murder of the first degree [Clk. Tr. p. 2], and Count II charging murder in the first degree arising out of the perpetration of a robbery, both referring to killing Jepson. The court entered a judgment of acquittal, during the course of the trial as to Count II which acquittal appellant contends constituted a bar to the charge contained in Count I, and that the court erred in not allowing appellant to enter his plea of jeopardy.

Appellant previously at age 17 enlisted in the United States Navy from Louisiana, and thereafter served in the Pacific War Theatre on various ships as a Steward's Mate, and was discharged from the service, December 10, 1947 [Rep. Tr. p. 529]. Shortly thereafter he was convicted of illegally wearing a naval uniform, a misdemeanor (10 U. S. C. A. 1393). He was thereafter discharged from the Los Angeles County Jail on March 31, 1948 [Rep. Tr. 497, p. 24]. On April 2, 1948, he went to the Naval Reservation illegally in a Navy uniform, for the purpose of validating his previously issued naval railroad ticket to Louisiana [Rep. Tr. 306, and Ex. 15]. The transportation office on the reservation was closed, and appellant decided to stay overnight in the barracks because it was raining [Rep. Tr. pp. 531, 532 and 547, line 6]. He became involved with naval personnel over a blanket when he sought to retire. About midnight he left the Naval Reservation by climbing over the fence, and started to walk down the public highway toward Long Beach. He was stopped by naval personnel from the Naval Reservation, and at the point of a gun held by Chief Petty

Officer Cox, was forced into a naval station-wagon, and was thereafter taken to and held by naval personnel at the reservation [Rep. Tr. p. 533, line 19, and p. 283, line 3]. It is undisputed that the naval personnel thought the appellant was an enlisted man of the United States Navy, and further that appellant did nothing to change this opinion. Appellant was thus returned from the open public highway to the Naval Reservation against his will and over his protests, and was taken to the naval brig for confinement [Rep. Tr. p. 535, line 6]. A naval confinement paper referred to as a Report Slip, Exhibit 8, was issued and signed by the naval officer in command, and it was by virtue of this naval confinement document that appellant was ordered confined [Rep. Tr. p. 300]. He was being escorted by an armed guard from the dispensary in route to the brig, at the time he over-powered his guard in the darkness [Rep. Tr. p. 537, line 7]. Appellant told the guard, "don't holler, because I don't want to hurt you, all I want to do is get away" [Rep. Tr. p. 538, line 3]. During the time of the struggle, deceased by coincidence walked around the corner of a building that blocked appellant's escape and at some 60 feet, appellant shot in the dark with the guard's gun. In his language, "I whirled (from fighting with the guard), and grew tense, put pressure on the trigger, and the gun went off, and I heard someone fall, and he groaned, and I ran" [Rep. Tr. p. 538, line 6]. Appellant turned (from the guard) because he was afraid of being locked up, according to his testimony [Rep. Tr. p. 564, line 14].

Appellant immediately fled from the scene of the shooting, running past the body of deceased, and left the reservation, sneaking out through the main gate. He was apprehended shortly thereafter with the death gun in hiding on a deserted ship [Rep. Tr. p. 539]. He made a full confession of his acts to agents of the Federal Bureau of Investigation [Rep. Tr. p. 483]. The trial court instructed the jury that the legality of the arrest and detention was immaterial, over strenuous objection.

As already it has been pointed out, appellant was charged with murder in two counts, the first being murder of Jepson [Clk. Tr. p. 2], and the second count being murder of Jepson arising out of a robbery, to-wit: the guard's gun [Clk. Tr. p. 3]. The second count was disposed of by a judgment of acquittal, and appellant then attempted to interpose a plea of jeopardy arising out of the disposition of Count II as to Count I, being the count upon which he was convicted. While other assignments of error were made during the course of the trial, appellant now concedes that such error if any, would not be prejudicial, by reason of the jealous regard of the civil rights of the defendant, accorded by the patient and painstaking trial judge. The record is free of any misconduct on the part of the prosecuting attorney, who presented the case with firmness resulting in conviction in the first degree, but without any over-reaching as to the rights of the appellant. However, appellant confidently presents the two specifications of error, and strenuously urges them as grounds for reversal, they constituting errors of the mind and not of the heart.

SPECIFICATION ASSIGNED ERROR— NUMBER ONE.

The trial court erred in instructing the jury “it is immaterial whether or not the arrest, detention, and custody of the defendant by Navy personnel, other than the deceased Jepson, or the acts and conduct of such other Navy personnel before the killing, were lawful or unlawful,” and in refusing defendant’s instruction No. 2, regarding self-defense, to-wit: Section 50, California Civil Code, and defendant’s instruction No. 22, regarding California arrest procedure quoted from Sections 841, 835 and 858, California Penal Code, all of which was excepted to during the course of the trial [Rep. Tr. pp. 581 to 588, and p. 599, line 10, to p. 601, line 1]. (See appendix B for full quotation of specified error.)

THE ARREST AND DETENTION WERE UNLAWFUL.

Appellant in his trial memorandum filed before the commencement of the trial, asserted that the arrest and restraint was unlawful, and that the homicide could be of no greater degree than manslaughter. The memorandum concluded with a challenge to the prosecution to legally justify the arrest. Appellant thereafter, repeatedly, throughout the trial, argued the proposition that appellant being a civilian, was not subject to arrest or detention by naval personnel, except for the express purpose of being held for civilian authorities [see Rep. Tr. p. 108, line 12, where appellant challenged the prosecution to justify the illegal arrest, and Rep. Tr. p. 222, line 13, where appellant questioned the authority of the arrest under Exhibit 8, and Clk. Tr. p. 235, line 10, where appellant objected to

the admission into evidence of Exhibit 8, the Navy commitment paper, and Clk. Tr. p. 505, line 11, to p. 521, line 17, being the argument on motion for judgment of acquittal, and Rep. Tr. p. 598, line 8, being discussion incidental to the matter of the jury instructions, and Rep. Tr. p. 672, line 2, where the prosecution discussed the matter of the arrest in the argument to the jury, and Rep. Tr. p. 514 to 516, where appellant requested instructions to the jury, in the language of Section 50, California Civil Code, Sections 841, 835 and 858, California Penal Code, and Section 151, subd. 3, Naval Regulations].

Appellant was first arrested without a warrant and taken into custody, while walking on the open highway en route to Long Beach, outside the Navy Reservation. Hence, the legality of his arrest, by the naval officer, is determined by applicable California State statutes, *United States v. Di Re*, 68 Sup. Ct. 222, 92 L. Ed. (Adv. Ops.) 218 (1948), and *Johnson v. United States*, 68 Sup. Ct. 367, 92 L. Ed. (Adv. Ops.) 323 (1948). In the *Di Re* case, the court said:

“We believe, however, that in absence of an applicable Federal statute, the law of the State where an arrest without warrant takes place, determines its validity.” (68 Sup. Ct. 226.)

The court further said:

“No act of Congress lays down a general Federal rule for arrests without warrant for Federal offenses. None purports to supersede State law.” (68 Sup. Ct. 227.)

To the same effect, see

Johnson v. United States, 68 Sup. Ct. 367, 92 L. Ed. (Adv. Ops.) 323 (1948).

When appellant was taken against his will, in the station-wagon, back to the Navy Reservation, the California statutes on arrest still applied. Section 1515, subdivision 1, Naval Regulations, which provides:

“The commandant or commanding officer of any naval station or other naval reservation situated within the limits of any State, Territory, or District, which has been acquired by the United States through purchase or otherwise for naval purposes, and over which the United States has exclusive jurisdiction, *shall require all persons within the limits of such stations or reservations strictly to observe all existing Federal laws, including the penal laws creating offense not otherwise covered by any act of Congress, of the State, Territory or District, wherein the station is located in effect on April 1, 1935, and remaining in effect, which have been adopted as Federal laws by section 289 of the United States Criminal Code.*

Offenses committed by persons in the naval service within the limits of such station or reservation shall be punished as authorized by the Articles for the Government of the Navy, the Navy Regulations, and the customs of the service.

Persons not in the naval service who commit offenses within the limits of such station or reservation, including the offenses contemplated by section 289 of the United States Criminal Code, are subject to trial in the United States District Court for the district in which the station is situated.

Care shall be taken by commandants and commanding officers to see that any reservations contained in the instrument conveying title to the United States or the act of legislature ceding jurisdiction to the United States are observed.”

18 U. S. C. A. 468, Criminal Code, Section 289, provides:

“Laws of States adopted for punishing wrongful acts; effect of repeal. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section 451 of this title, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territory, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.”

The applicable California statutes on the matter of the arrest, are set forth in Sections 835, 841, 849 and 858, California Penal Code, which provides as follows:

“835. *Restraint Limited to Necessity.*—An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention.”

“841. *Notice of Authority and Intent to Arrest.*—The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape.”

“849. *Duty of Officer to Take Accused Before Magistrate.*—When an arrest is made without a warrant by a peace-officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and (1) a complaint stating the charge against the person, must be laid before such magistrate.”

“858. *Informing Accused of Nature of Charge and Right to Counsel.*—When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings.”

Chief Petty Officer Cox committed at least a misdemeanor under the California law, when acting without a warrant, he forced appellant into the station-wagon on the highway to Long Beach [Rep. Tr. p. 282, Sec. 146]. California Penal Code, Section 146, which state:

“146. *Officer Acting Without Regular Process.*—Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor.”

When Chief Cox took appellant into custody on the highway, the state law applied, and when he drove him against his will onto the Naval Reservation, the statutes making state law applicable to government reservations

became applicable. These statutes were Section 1515, Naval Regulations, and 18 U. S. C. A. 468, Criminal Code 289, *supra*. Thus the foregoing California statutes concerning the mode and legality of the arrest of appellant governed the situation, both on and off the Naval Reservation. Chief Cox did not comply with state law, Section 841, Penal Code, by notifying appellant as to "the cause of arrest." It is fundamental that the arrest must be sustained upon the grounds stated at the time, and can not be thereafter justified on other grounds (*United States v. Di Re, supra*). Hence appellant was illegally arrested outside the Naval Reservation, and also illegally held in custody (not for the purpose of turning him over to civil authorities) on the Naval Reservation at the time of the killing. The naval personnel were guilty of false imprisonment, a misdemeanor, Section 236, Penal Code, and appellant had the right to resist, Section 50, Civil Code, and Section 692, Penal Code, making it lawful to resist the commission of a public offense, and of self defense.

Sections 236 and 237, California Penal Code, provide:

"236. *What Constitutes*.—False imprisonment is the unlawful violation of the personal liberty of another."

"237. *Punishment*.—False imprisonment is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not more than one year, or by both. If such false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the State prison for not more than one nor more than ten years."

Section 50, California Civil Code, gave appellant the right to break away from the illegal arrest and detention, which section provides:

“50. *Right to Repel Invasion of Rights by Force.*
—Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one’s family, or of a ward, servant, master, or guest.”

Appellant was a free man, and had the God-given right to walk to Long Beach if he so desired, and the United States Government, acting through Navy Chief Officer Cox, did not have the right to deprive appellant “of life, liberty, or property, without due process of law,” Fifth Amendment of the Constitution, and further under the Fourth Amendment, he was protected from unlawful search or seizure, said amendment providing as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Shaw, Presiding Judge, said:

“The imprisonment being proven, the law presumes it unlawful until the contrary is shown. It is for the defendant to justify it by proving it was lawful.” (*People v. Perry*, 79 Cal. App. 2d (Supp.) 906, 180 P. 2d 465-469, quoting from *People v. McGrew*, 77 Cal. 570, 20 Pac. 92.)

To the same effect, see:

35 Corpus Juris Secundum, Section 55, notes 4 and 5.

The language of the majority in *United States v. Di Re*, 68 Sup. Ct. 222-228, 92 L. Ed. (Adv. Ops.) 218 (1948), is particularly applicable to the instant case, in measuring the rights of appellant in view of his submission to the illegal arrest on the highway, and as to his rights in resisting false imprisonment at the time of the killing. The court there said:

“The Government also makes, and several times repeats, an argument to the effect that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station. One has an undoubted right to resist an unlawful arrest and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence.”

For naval J. A. G. orders and discussion of arrests of civilians by naval personnel, see Appendix A.

HOMICIDE ARISING OUT OF ILLEGAL ARREST MAY BE EXCUSED OR REDUCED TO MANSLAUGHTER.

The general rule is stated in 40 Corpus Juris Secundum, 915, Section 50(b), as follows:

“An illegal arrest, detention, or similar act is adequate provocation to reduce a homicide committed in resisting it to manslaughter, at least if the accused knew of its illegality.

As the rule is ordinarily stated, an illegal arrest or attempt to arrest is adequate provocation to reduce a homicide to manslaughter, unless the homicide was in fact committed with malice, the absence of which is not necessarily established by the fact that the arrest or attempt to arrest was illegal. In order to permit the application of the doctrine there must not only have been an illegal arrest but the killing must have been done in actual resistance to the act of making the arrest and retaining illegal custody of the accused. A mere declaration of an intent to make an illegal arrest unaccompanied by an attempt to do so is not adequate provocation.

The rules as to provocation occasioned by an illegal arrest have also been applied to cases of other illegal or unauthorized violences by an officer, or of illegal detention by officers or private persons.”

40 Corpus Juris Secundum 1023, Section 137(b), in part states:

“ . . . if the attempted arrest is unlawful the killing of the officer may be excused or justified as in self-defense if in the course of resistance to the arrest it becomes necessary to prevent death or great bodily harm, or even, according to some authorities, to retain or regain liberty. So, too, one who is restrained of his liberty under an illegal arrest may

use such force as is necessary to regain his liberty, and, if it reasonably appears that the officer intends to kill him or do him great bodily harm in order to prevent his escape, he may kill the officer in self-defense.

A few courts hold that a person has a right to resist an unlawful arrest, even to the extent of taking the life of another, if it is necessary in order to regain his liberty and freedom, or if it is necessary as an alternative to submission. These courts hold that a person has as much right to resist an invasion of his personal liberty, and under proper circumstances to take life, as he has to resist death or serious bodily injury."

The reported federal cases are consistent with the general rule stated above, see *Brown v. United States*, 16 Sup. Ct. 29, 40 L. Ed. 90; *Starr v. United States*, 14 Sup. Ct. 919, 39 L. Ed. 841; *Reichman v. Harris*, 252 Fed. 371-382. Appellant challenges the respondent to show any federal authority inconsistent with the foregoing general rule as stated herein. We submit that there is none.

Presiding Judge Shaw, of the Los Angeles Appellate Department, a court of last resort in California, in the case of *People v. Perry*, 180 P. 2d 465-470, 79 Cal. App. 2d Supp. 906, in interpreting the various provisions regarding California arrest procedure, eloquently said in reference to a false arrest:

"Unless that arrest was lawful, then, as already stated the officers were under no duty to make it, and resistance to their action in the matter was not a violation of section 148, Penal Code (46 Cor. Jur. 874). Moreover, if an arrest is unlawful, either the person being arrested or others acting in his behalf may resist the arrest, using no more than reasonable force for that purpose. This is the effect of sections

692, 693 and 694 of the Penal Code, which provides that lawful resistance to the commission of a public offense may be made by the party about to be injured or by any other person in his aid or defense, either of whom may make sufficient resistance to prevent the offense. These sections apply here because the arrest, if unlawful, is a violation of section 236, Penal Code, and therefore a public offense. This right of resistance was conceded in *People v. Craig*, 152 Cal. 42, 45, 50, 91 P. 997, where it was held that the arrest was lawful and resistance to it was not justified, but the court said: 'Since the right of a person to resist an unlawful attempt to subject him to arrest cannot be denied * * *,' and further, 'The right of one person to aid another in defending against a threatened injury is defined by our statute (Penal Code, Sec. 694), and does not differ substantially from the right as it existed under the common law. He cannot interfere except in aid of a lawful resistance by the person threatened.' In *People v. Dallen* (1913), 21 Cal. App. 770, 775, 132 P. 1064, the court said: 'There can be no doubt that a person has the right to 'resist an unlawful attempt to subject him to arrest.' (*People v. Craig*, 152 Cal. 43, 45, 91 P. 997) but held that in so doing such person cannot take the life of the arresting person, unless he is resisting also threatened danger to his life or limb and may reasonably so do for that purpose. In *People v. Bradley* (1913), 23 Cal. App. 44, 46, 136 P. 955, the court conceded that an unlawful arrest 'might have been rightfully resisted with the same degree of force employed in making the arrest,' and this concession was quoted with apparent approval in *People v. Gilman* (1920), 47 Cal. App. 118, 123, 190 P. 205.

Similar decisions may be found elsewhere. Thus in *Ryan v. City of Chicago* (1906), 124 Ill. App. 188, 190, where the appellant was charged criminally with

resisting an officer who arrested him without a warrant, the court held the arrest illegal because no act done in the presence of the officer was a crime, and held further that 'The arrest being unlawful, appellant had a right to meet force with force, if in so doing he used such force only as was reasonably necessary to repel the assault upon his person.' In *State v. Bradshaw* (1916), 53 Mont. 96, 161 P. 710, 711, the defendant was charged with resisting an officer seeking to arrest him without a warrant, and the court held that if the arrest is not lawful 'the person sought to be arrested may use such force as may be necessary to prevent the arrest.' In *State v. Small* (1918), 184 Iowa 882, 885, 169 N. W. 116, it was held that where the arrest without a warrant is unlawful because no offense has been committed, 'the party arrested may resist with such force as appears to him, acting as an ordinarily prudent man, to be reasonably necessary. The law jealously guards the liberty of the citizen, and a public officer has no right, because of being clothed with the habiliments of office, to interfere therewith, save as provided.' The court further held that an instruction erroneous which said the defendant owed the duty to submit to the officer, if he knew of his official character at the time, saying, 'He owed no such duty unless, at the time, he was engaged in the commission of a public offense.' "

We conclude in this particular, that both the arrest and detention of appellant were unlawful under the California law and hence, also under the federal law. Further, that the arrest and detention being unlawful, the trial court committed prejudicial error in instructing the jury that the illegality of the arrest and detention was immaterial. The judgment of conviction should be reversed on this ground alone.

SPECIFICATION ASSIGNED ERROR—
NUMBER TWO.

The court erred in denying appellant's motion for leave to withdraw his plea of not guilty to Count I, for the purpose of entering the further and additional plea of jeopardy and the court erred in rejecting defendant's offered plea of jeopardy, all of which was duly excepted to [Rep. Tr. p. 503, line 8, to p. 505, line 1]. (See appendix C for full quotation of specified error.)

Count I charged that appellant "with premeditation and with malice aforethought shot and murdered Howard Evert Jepson." By Count II, appellant was charged "in the perpetration of the robbery of Edwin Garven Ballard, and with malice aforethought did shoot and murder Howard Evert Jepson."

In each instance, appellant was charged with the murder of Jepson in the first degree. It would have been an impossibility for him to have murdered Jepson twice, as Jepson was subject to but a single killing. When the appellant was subjected to trial on Count II, he was in jeopardy for the murder of Jepson. The judgment of acquittal, acquitted him of the murder of Jepson and created a jeopardy and bar to the further prosecution of Count I.

The Fifth Amendment to the Constitution provides in part ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The matter of jeopardy must be specially pleaded (*Brady v. United States*, C. C. A. Kansas (1928), 24 F. 2d 399), hence the motion to enter the plea was proper. Where a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense. (*Morgan v. Devine*, Kansas (1915), 35 Sup. Ct. 712, 55 L. Ed. 1153.) To the same effect see *Rutkowski v. United States*, C. C. A. Mich. (1945), 149 F. 2d 481, and *Montgomery v. United States*, C. C. A. W. Va. (1945), 146 F. 2d 142. Jeopardy was complete on the swearing of the jury. (*Sanford v. Robbins*, C. C. A. Ga. (1941), 115 F. 2d 435.)

There could be but one murder of Jepson.

So when the court entered its judgment of acquittal on Count II, appellant was acquitted of having murdered Jepson. This created an effective bar by way of jeopardy to the further prosecution of Count I charging appellant with the murder of Jepson. Liberality as to the joinder of offenses, provided by Rule 8(a), Rules of Criminal Procedure, does not cure the jeopardy, as stated in the Constitution.

CONCLUSION.

This brief would not be complete, if no reference were made to the rather unusual circumstances under which this appeal has been prosecuted. Counsel for appellant had informed him as to his rights by letter, which letter was referred to at the time of sentence [Rep. Tr. p. 719, line 22]. Attorney Joseph Stone had been previously appointed to defend appellant by reason of his service on the Los Angeles County Bar Association Committee to Aid Federal Indigent Defendants, and attorney Caryl Warner had been appointed from the federal bar, the day before the commencement of the trial to assist Mr. Stone, the charge being a capital offense [Clk. Tr. p. 709, line 20, to p. 710, line 7]. At the time of the passing of sentence, the appellant in open court stated that he was satisfied with the verdict and with the sentence of life imprisonment, and that he did not desire to either move for a new trial, or to appeal, although counsel indicated their willingness to proceed with the matter [Rep. Tr. p. 717, line 21, to p. 718, line 18]. However, following the passing of sentence, appellant had a change of heart, and this appeal has thus been perfected and presented. As a matter of further coincidence, both counsel are lieutenants in the United States Naval Reserve, and are attached to Volunteer Legal Reserve Unit No. 11-2.

Counsel are appreciative to Mr. Robert Parker, of Parker and Company, veteran law printers of Los Angeles, for his assistance in making the printing of this possible, and for his support of the federal defense program of the Los Angeles Bar Association.

We do not condone the killing of an innocent man. Our sympathy goes to the bereaved family. However, we do urge that appellant was entitled to his proper meas-

ure of the law. This is one of the precepts of the America that Joseph Barsock together with some 15,000,000 other men and women fought for in World War II, and the America that we must all continue to defend in the future. Whether a defendant be the humblest citizen, or the most dastard criminal, he should not be subjected to a first degree murder life imprisonment for a crime that could have been no greater than manslaughter. We earnestly contend that our position is sound, and that the judgment of conviction should be reversed.

Respectfully submitted,

CARYL WARNER,
WARNER & MOORE,

By DAVID C. MOORE and
JOSEPH L. STONE,
Attorneys for Appellant.

APPENDIX "A."

The JAG Journal, a carefully edited, but unofficial publication, of the Judge Advocate General of the Navy, Washington, D.C., October, 1948, issue, in an article entitled "Arrests in the Navy" by Comm. L. B. Castro, U. S. N., is illustrative of the foregoing matters. Commander Castro there in part said:

"There are two safeguards against misuse of the power of arrest provided for in Naval Courts and Boards, sections 101 and 60. The section first cited makes false imprisonment an offense under the purview of article 22, A. G. N. False imprisonment is described therein as 'any unlawful restraint of another's freedom of locomotion in any place whatever. It may be in a prison, in a house, or in a public street. There need be no actual force, but the person must reasonably apprehend force in case he does not submit. It must be against the will of the person imprisoned.' Section 60 punishes the 'maltreatment of a person subject to his orders.' The situations contemplated by this section would cover the maltreatment of an arrestee by the arrester, if without justifiable cause . . . In the case of a civilian who commits an offense outside the limits of the reservation in violation of State laws and thereafter returns to the reservation, a warrant for his arrest is sufficient authority to deliver the man to the main gate of the yard or reservation and there turn him over to the proper civil authorities. Likewise, a civilian unconnected with the naval service, who happens to be inside the reservation, should be taken to the yard gate and delivered to the custody of the civil authorities . . ."

Commander Castro further states:

“Civilians who commit crimes within a naval reservation may be arrested by officers of the Navy or Marine Corps. The civilians would be retained in custody until such time as they could be turned over to the proper civil authorities of the United States. They may not be arrested except on the Government reservation. Outside of the Government reservation, the arrest should be made by civil authorities. (C. O. M. 48, 1920, 9.)”

Court Marshal Order 48, 1920, 9, in part provides as follows:

“. . . In the enforcement of said general orders (National Prohibition Act) officers of the Navy or Marine Corps are authorized to arrest civilians who are apprehended in the act of violating any provisions of said orders and retain them in custody no longer than is necessary to turn them over to the proper civil authorities of the United States. They are not, however, authorized to arrest civilians except on the Government reservation. Outside of the Government reservation, within the zone described by the General Orders, or outside of said zone, arrests should be made by the civil authorities.

As stated by Mr. Justice Story in *United States v. Travers* (28 Fed. Cases No. 16, p. 537):

‘In a military post or garrison, every person who is voluntarily there either as a visitor or guest, is bound to observe peace and order, and to conduct himself inoffensively. If he excite a riot, if he attempt to stab or

wound or kill anyone within the lines (p. 10), he is liable to be arrested and detained until he can be placed in the hands of proper tribunals having jurisdiction to punish him. It is not competent for mere military officers in such case to apply imprisonment by way of punishment; but it is their duty to apply it, if necessary, to prevent bloodshed and to restore peace, and to keep the offender in order to answer over to a competent tribunal.'

The specific offenses referred to by Mr. Justice Story are felonies, but the rule is the same in misdemeanors—and violation of the executive orders above referred to is punishable as a misdemeanor.

With reference to arrest of offenders apprehended in the zone and not on the Government reservation, the fact should be reported to the United States Commissioner of that District, or to the United States marshal, and a warrant obtained for the arrest of the offender, which should be served by the United States marshal, or someone legally deputized to act for him." (File 29163-2, sec. nab., Feb. 24, 1920.)

APPENDIX "B."

The Court:

"In addition to the instructions which I have indicated, I will give the following instructions which I have written this morning:

'The evidence which has been admitted as to the conduct of the defendant during the course of the evening of April 2, and early morning of April 3, prior to the time of the killing of Jepson, and the apprehension, arrest, and detention of defendant and the acts of the Navy personnel in connection therewith were admitted in evidence for the purpose of aiding you in the determination of the questions of whether or not, beyond a reasonable doubt, the defendant actually did kill Jepson, and if so, whether or not, beyond a reasonable doubt, such killing was done intentionally, willfully, deliberately, maliciously, and premeditatively.

'The evidence in the case is not to be considered by you in connection with whether or not the arrest, detention and custody of defendant by Navy personnel, other than the deceased Jepson, prior to the killing, was lawful or unlawful.

'It is immaterial whether or not the arrest, detention and custody of defendant by Navy personnel, other than the deceased Jepson, or the other acts and conduct of such other Navy personnel, before the killing, were lawful or unlawful.'

You may note your exceptions now.

Mr. Warner: In order to get this straight, I understand that it is necessary for the defendant to preserve his objections to except to any instructions?

The Court: Yes.

Mr. Warner: That is ordinarily done at the conclusion of the charge. But with the court's permission, at this time the defendant excepts to the giving of the instruction just stated by the court for the following reason:

It is material whether or not the defendant was, first, lawfully arrested and, secondly, lawfully detained at the time in question. It is material for the reason that it goes to whether or not the homicide was justifiable, whether it was through heat and passion or making it manslaughter, or whether it was murder in the first or second degree.

We submit further that the facts surrounding the arrest are undisputed and that it is a matter of law for the court to declare to the jury what the status was at the time.

We have already submitted an instruction—

The Court: You say it is a matter of law?

Mr. Warner: Yes.

The Court: That is why I am telling the jury that it is immaterial.

Mr. Warner: But it is a matter of the law that the arrest was illegal and that the detention was illegal and the court should so instruct the jury.

The Court: If you wish an instruction on that I will instruct them that it was legal, but I am telling them that it is immaterial, that is, the acts and conduct of all the other Navy personnel except Jepson. Now the jury can take into consideration anything they want concerning the acts and conduct of Jepson because he was the man that was killed.

Mr. Warner: Very well. We have excepted and pointed out the reasons why, in our opinion, that it is proper. I believe I have already made the point.

The Court: May I suggest this, that in addition to all of the reasons that you have now assigned, if you have assigned any other reason during the course of the trial or the conference on instructions which now have escaped your mind momentarily, they may be deemed to have been urged at this time.

Mr. Warner: Yes. We make that further objection and exception. Thank you, your Honor.

The Court: And the rule is that the exceptions must be taken before the retirement of the jury. I usually permit them to be taken before they argue to the jury so that the record will show when the jury retires that they have been made and counsel of course may, at the conclusion of the instructions, make any other exceptions which might occur to them during the course of the giving of the instructions."

APPENDIX "C."

"The Court: It seems to me like the defendant is either guilty of murder in the first degree or he isn't. I may be stretching a point, but I doubt, with the evidence in this case, that I would be justified in denying a motion to dismiss the second count, and the motion to dismiss the second count will be granted.

Mr. Champlin: Very well, your Honor.

The Court: That is to say, there will be a judgment of acquittal on the second count. However, that is only as to the robbery, and leaves pending the first count.

Now, do you have another point on your first count?

Mr. Warner: Do I understand now that the second count has been dismissed?

The Court: The second count is dismissed.

Mr. Warner: At this time the defendant asks leave of court to withdraw his plea of not guilty to count 1 for the purpose of entering a further and additional plea of jeopardy.

The Court: A plea of jeopardy?

Mr. Warner: Yes, sir, that's right.

The Court: The motion is denied.

Mr. Warner: At this time the defendant offers to plead to count 1, in addition to the plea of not guilty heretofore entered, the plea of once in jeopardy as to count 1, in that on or about, whenever it was, the 7th day of June, 1948, in the Federal District Court of this particular court, the defendant was charged with murder in count 2 of the indictment in this case—just a moment, let me get our papers here—and that a jury was empaneled and sworn to try him, witnesses were sworn and testified against him, and that on this 11th day of June, 1948, the said charge,

count 2, was dismissed upon a judgment of acquittal entered.

The Court: The judgment of acquittal as I read the civil rules here means a judgment of acquittal for failure of proof, not a judgment of acquittal in the ordinary sense.

If the Supreme Court intended it to be that way, where there are several counts in an indictment—

Mr. Warner: Other counsel had in mind the original indictment that was dismissed here.

The Court: Was it dismissed?

Mr. Warner: No, that is a little different.

The Court: If the Supreme Court intended in a multiple-count indictment, where judgment might be granted on a motion such as made here, that that would be once in jeopardy, they are the ones that are going to have to decide that. Otherwise the making of motions for dismissal or judgment of acquittal on failure of proof would become a mere form. It wouldn't have any substance, because no judge is going to work in a situation like that and dismiss a count if technically it is going to result in a dismissal of all counts in an indictment.

Mr. Warner: I was brought up in the school, your Honor, to make those motions and make those objections.

The Court: Counsel, I commend you for making them. It is your duty, and you are doing it very well, both of you. It is your duty to do everything which the law permits you to do in the defense of your client, and it is your duty, above all, to see that the government is forced and compelled to prove your client guilty beyond all reasonable doubt."

No. 12013

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH BARSOCK,

Appellant and Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent and Plaintiff.

APPELLEE'S BRIEF.

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FILED

JAN 25 1949

PAUL P. O'BRIEN,

CLERK

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APPELLEE'S BRIEF.

**Statement of Pleadings and Facts Disclosing
Jurisdiction.**

This appeal is from a judgment of conviction of murder on Government property, Title 18, U. S. Code, Sections 451 and 452 thereof, said judgment having been entered by the United States District Court for the Southern District of California, at Los Angeles, California, on July 26, 1948 [Clk. Tr. 27].

The defendant and appellant, Joseph Barsock, was charged in Count One of the Indictment with having shot and murdered Howard Everett Jepson, with premeditation and malice aforethought, on the date of April 3, 1948,

in Los Angeles County, California, within the Central Division of the Southern District of California, and on lands acquired for the use of the United States and under the exclusive jurisdiction of the United States, namely: the United States Naval Station, Terminal Island, California [Clk. Tr. 2].

In Count Two of the Indictment the defendant and appellant was charged with the offense of murder of Howard Everett Jepson, with malice aforethought, in the perpetration of the robbery of (one) Edwin Craven Ballard, on the same date and place as set forth in Count Two [Clk. Tr. 3].

A motion was made by defense counsel for a judgment of acquittal as to Count Two, in its entirety at or near the end of the Government's case [Rep. Tr. 494].

The Court entered a judgment of acquittal on the second count, which pertained to the robbery only, and which left pending the first count [Rep. Tr. 503].

A verdict of guilty as charged in Count One of the Indictment without capital punishment, was returned by the jury on June 12, 1948 [Clk. Tr. 24].

It was further adjudged that the defendant be committed to the custody of the Attorney General or his authorized representative for life imprisonment [Clk. Tr. 27].

A notice of appeal was filed by the defendant-appellant on August 3, 1948 [Clk. Tr. 31, 32] to this Court, which has appellate jurisdiction under Title 28, U. S. C. A., Sections 225, 345 and 1291.

STATEMENT OF THE CASE.

Facts.

The statement of facts set forth in Appellant's Opening Brief, commencing on page 1 thereof, is not acceptable to appellee for the reason that the statement is too selective, and interpretative, and incomplete. The following summary of the evidence pertinent to the questions before this Court is submitted as a more objective synopsis.

The appellant and defendant, Joseph Barsock, was born in New Orleans, Louisiana, on March 2, 1926. He was discharged from the United States Naval service in December, 1947 [Rep. Tr. 447, 448 and 449], at Long Beach, California.

On March 31, 1948, after a plea of guilty to illegal wearing of the United States Navy uniform, he was sentenced by Honorable J. F. T. O'Connor, in the United States District Court for the Southern District of California, to six months in jail, sentence suspended, and placed on three (3) years probation in Case No. 19884 [Pltf. Ex. 42, Rep. Tr. 523].

Appellant was released from the Los Angeles County Jail March 31, 1948, took a room at a Los Angeles Hotel, checked out of said hotel April 2, 1948, and put his bags in a storage locker at Pacific Electric Station in Los Angeles, and took a train to Long Beach, California. While wearing a Navy enlisted man's uniform, rate Seaman First Class, he entered Gate 1 of the Terminal Island Naval Base about 5:30 p.m. on the date of April 2nd [Pltf. Ex. 41].

During this time, appellant had ample civilian clothing in his bags and luggage which was checked in the Pacific Electric station locker, as aforesaid, and which clothing

was worn by the defendant during the course of this trial, after having dressed in the United States Marshal's office in the presence of F. B. I. agent Alfred G. Gunn, prior to the trial [Pltf. Exs. 34, 35, and Rep. Tr. 446, 450, 451 and 452]. Appellant spent the next three or four hours in the recreation hall on the Naval Base and after taps went to Barracks No. 34 to sleep. After he was there a few minutes, he was seen taking a blanket off one of the bunks by the Master at Arms, Charles Schoen [Pltf. Ex. 41, and Rep. Tr. 161, 162]. He was then taken to Gate 1 on the base to see the Officer of the Day, Lieut. George Carey, who was the Base Security Officer and Senior Watch Officer. It was around midnight when Mr. Carey returned from his last inspection of the base and saw appellant for the first time. Appellant came to attention and stood up, as the officer entered. He admitted taking the blanket, said he just arrived that day; said he realized the seriousness of it, and promised there would be no recurrence of this case if allowed to go back to his barracks. The officer then directed appellant be taken back to Barracks 38 for the night [Rep. Tr. 207, 209, 210 and 211].

When asked for his identification by the Master at Arms Schoen, the appellant produced an identification card and a liberty card, both bearing the names of Lawrence Arthur Clover. These same cards were shown to the Officer of the Day [Rep. Tr. 224, 225]. No permission was given by Clover at any time to anyone to use said two cards, which were missing with his billfold since March 30, 1948 [Rep. Tr. 199 and 203].

Upon return to the barracks the Master at Arms questioned appellant about the clothing he was wearing [Pltf. Ex. 41]. The name stenciled in ink on his hat was

Morris; that on his undershirt was Sawyer; that on his socks was Coats [Rep. Tr. 168 and 169, also Pltf. Exs. 11, 12 and 13]. He was told to wait there while the O. D. (Officer of the Day) was called. Instead he got dressed, left the barracks and climbed over the barbed wire fence and left the Navy Base. Appellant was apprehended by Chief Petty Officer Robert D. Cox, who was in charge of a roving patrol and on watch that night. His duties were prescribed under instructions and orders of the Commanding Officer of the base [Pltf. Ex. No. 22, Rep. Tr. 285, 286].

Upon being returned to the Security Officer by Chief Cox, appellant was questioned by Chief Petty Officer Wiley D. Bennett, who was Junior Officer of the Day [Rep. Tr. 293, 294]. He told Cox about 2 a.m. that he was Clover, that was his name; that he had been transferred from the Naval Hospital that afternoon at 3:00 p.m., from Ward N-10. Chief Cox checked with the Navy Hospital and was informed Ward N-10 had been closed for a month [Rep. Tr. 298]. Defendant was told he was under arrest and would be taken to the brig at the dispensary [Pltf. Ex. 41].

The committment papers [Pltf. Ex. 8] were signed by the O. D., Lieut. George Carey, about 3:00 or 3:15 a.m. [Rep. Tr. 227, 228]. As Officer of the Day at the Naval Station, Mr. Carey was the direct representative of the Commanding Officer of the Navy Base [Rep. Tr. 216, 217]. Appellant was charged with: (1) jumping ship (leaving a base without authority); (2) unauthorized wearing of other men's clothing, and (3) roving about the grounds and barracks after taps [Pltf. Ex. 8].

The guards took appellant to the dispensary in a station wagon. One guard, known as a "prison chaser" was

armed with a .45 caliber service automatic. His name was Ballard and together with Harris, who drove the car, they took the prisoner to the sick bay or dispensary [Rep. Tr. 335, 337, 338, 341, 342].

Ballard was with the prisoner at all times while at the sick bay or dispensary [Rep. Tr. 344]. The doctor on duty was Lieut. George A. Benish, but he didn't see the prisoner as he was busy with an emergency case [Rep. Tr. 124, 125]. Chief Pharmacist's Mate, Howard Everett Jepson (the deceased), examined the prisoner and signed his medical clearance papers before being taken to the Brig [Rep. Tr. 345, 346]. Chief Jepson was not on duty officially that night, but was merely helping take care of emergency cases [Rep. Tr. 124].

The papers were signed about 3:15 a.m. and the guard, Ballard, took the prisoner out the back door of the dispensary into an enclosure, similar to a courtyard, formed by the buildings, en route to the Brig [see Pltf. Ex. 2—a map of area, and photographs, Pltf. Ex. 23]. The prisoner was ten or twelve feet ahead of the guard, when he turned, jumped on the guard and, after a struggle of approximately five minutes, wrested the gun away from him, then backed off fourteen or fifteen feet, racked the mechanism of the automatic pistol back, thus throwing a shell into the firing chambers [Rep. Tr. 347, 348, 349]. Appellant then held the gun on the chaser, who made no attempt to come toward him. Just then someone appeared from the direction of the driveway; the chaser (Ballard) hollered to this person, "Hold it, Chief. He has got my

gun" [Rep. Tr. 350]. Appellant then turned and fired the gun at the person in the driveway. He heard him groan, and realized he had hit him; never shot any more, but ran out of the driveway to the main gate, slipped past the guard where he was not looking, and headed across the field toward the channel on the north side of the island [Pltf. Ex. 41, and Rep. Tr. 351, 538].

Doctor Benish was called; they carried the victim into the dispensary; emergency treatment was given but he died in five minutes, at 3:30 a.m.—April 3, 1948 [Rep. Tr. 134 and 141]. The victim was identified as Chief Jepson [Rep. Tr. 131], and the cause of death was a gun shot wound that penetrated the entire body, the bullet having gone through the heart [Rep. Tr. 158, Pltf. Exs. 6 and 7].

Appellant, after leaving the Navy Base, came across a car parked near some oil wells, broke into the door window with the butt of the gun and took a leather jacket from the car, after which he climbed aboard a ship anchored in the channel, took off his clothes, put the gun [Pltf. Ex. 20] under his pillow and lay down on the bunk and went to sleep, where he was apprehended and arrested by officers of the Long Beach Police Department at about 10 a.m. [Pltf. Exs. 41, 25 and Rep. Tr. 392 to 405, incl., and 539].

QUESTIONS INVOLVED.

- I. Whether or not the legality of arrest and custody prior to a killing, and by persons other than the deceased, was material to the issue [Rep. Tr. 598 and 599].
 - A. Where A arrests B, and while in custody B overpowers A's guard, and thereafter with A's gun kills C, a 3rd person, is it material whether the arrest was lawful or unlawful?
 - B. If such arrest were in fact lawful, is there any prejudicial error in an instruction that said legality was immaterial?
 - C. If such arrest were illegal, which is not conceded, and after the chain of custody is broken, the defendant kills another as his next step to escape, is this not an intervening or superseding factor that precludes reduction of the offense to manslaughter or a matter of law?
 1. If so, is it error to instruct that legality or illegality of arrest is not material? Is not such error harmless, if any?
- II. Whether in the trial of a defendant indicted on two counts, and the court grants defendant's motion for acquittal on one count, there is error in denying his motion thereafter to enter a plea of former jeopardy on the remaining count? [Clk. Tr. 3, and Rep. Tr. 503.]
 - A. Whether a defendant is entitled to a plea of former jeopardy, where there has been but one trial, one jury, and one count of his indictment presented to that jury?

ARGUMENT.

Summary.

The appellant and defendant through his counsel bases his appeal primarily upon the premises that his arrest and temporary detention were both unlawful. If such were the case, he contends that the killing of Chief Jepson would at most constitute manslaughter, as a matter of law. Should this premise prove fallacious, it must follow that his specification of error, Number One, is without merit.

The facts are undisputed that Chief Howard Jepson had nothing to do with the arrest or detention of defendant. He was not on duty that night officially but volunteered his services during a period of emergency. He examined the defendant in the dispensary and signed his medical clearance, which was routine procedure in the case of every prisoner prior to being sent to the Brig, or Navy guard house.

The facts are undisputed that the arrest was made by other Navy personnel, that the statement of charges placed against the defendant were signed by other Navy personnel, that prior to the shooting defendant was in the custody of a Navy guard known as a prison chaser, that prior to the shooting the guard was overpowered and defendant gained possession of the guard's gun, that at no time did Chief Jepson have a gun, nor did he say anything that anyone understood immediately prior to the time defendant shot him.

Therefore, since the defendant held dominion over the entire situation, since he now had a loaded gun in hand and held his former custodian at bay, since his arrest, legal or otherwise, was broken, and he stood free of all

physical detention, the shooting of Chief Jepson, when he appeared in the driveway, was an event subsequent to and independent of the arrest and custody.

Thus the time had passed during which defendant could claim he was illegally arrested and detained. The connection between a killing to escape from one type of arrest distinguished from another had been severed. In legal effect, defendant stood in a new relationship toward Jepson, a third person, much the same as if never arrested or detained. Then, it becomes a question for the jury, whether it was a killing with malice aforethought and premeditation, and on this point the jury has spoken in the affirmative.

The arrest and temporary detention of the appellant was both lawful and justified under the circumstances. There is ample authority for a Commanding Officer of a Naval Station, or his authorized personnel, including the Security Officer, Chief Petty Officer, and enlisted men, who were performing their duties in the chain of command directly under their superior officer, to make an arrest of a civilian who was found committing offenses within a military or Naval establishment. Where such offenses are committed within the reservation and the subject escapes by climbing over a fence and is pursued immediately thereafter, he may be held until he can be released to the proper civilian authorities.

California Statutes provide that an officer or a private person may make an arrest for misdemeanors committed in their presence. Had it been known to the Navy personnel at the time of the arrest of appellant that he was a civilian, he could have been arrested for the offense of wearing the service uniform illegally, which is a federal offense in addition to the offense defined under the

California Statutes of disturbing the peace of the garrison in question. But for the deception of the defendant and his false representations, the parties in making the arrest would have known he was a civilian and would have acted accordingly.

However, at all times he represented to them that he was an enlisted man in the United States Navy; that he had been discharged from a Naval Hospital that afternoon, and that his name was CLOVER, and produced two identification cards bearing that name and at no time did he disclose to anyone during the time in question that he was a civilian. Therefore, the doctrine of estoppel should apply to the appellant, and he should not be heard to say that Naval personnel had no authority to arrest him for offenses which would otherwise be punishable under the Articles for the Government of the Navy. It would defeat the ends of justice if one is allowed to hide behind his own deception and set up a defense of illegal arrest, such as proposed here. The equitable doctrine of estoppel has been applied to cases at law and has been raised in criminal cases, not only against the Government, but others according to well recognized authority.

Even where the arrest of a defendant is illegal, which is not here conceded, the prisoner may not take the life of an officer or person attempting to make his arrest, unless the circumstances at the time are sufficient to justify a reasonable man in the belief that his life is in danger, or that he is in danger of great bodily harm from the person making the arrest. Therefore, when there is no show of force by the person making the arrest, or by third persons such as the deceased in this case, the homicide is neither justified under the theory of self-defense, nor is it reduced from murder to manslaughter. The

law of California, and that of other jurisdictions cited by the appellant, pay lip service to the rule, but in each case set forth hereinafter, it is either an exception to the rule, or the courts vigorously affirm that the rule does not apply therein. In the present case, we submit that the rule has no application either.

It is further contended by appellant that he was placed in double jeopardy by standing trial on one count of his Indictment, after the second count had been dismissed upon the motion of his counsel and the Order of the Court. Under the Fifth Amendment to the Constitution, and the decisions of the courts, it has been held that one is not entitled to a plea of former jeopardy unless he has been placed on trial for the offense and acquitted, or convicted, prior to the trial in question. Where there has been but one trial and the defendant has been placed in danger of his life, or liberty, before only one jury, and where there has been only one verdict and judgment arising out of the single offense such as we have here, he has no standing to enter a plea of former jeopardy where he was acquitted on one count of an Indictment, and convicted upon the other in the same proceeding.

In conclusion, the judgment of the trial court should be affirmed unless from a review of the record and all of the evidence, it appears that whatever error was committed, if there was any, was prejudicial to the defendant and resulted in a miscarriage of justice. We submit that no error was committed by the trial court in this case, but if an error were committed, it was harmless, and the appellant was not prejudiced thereby. Therefore, since appellant was accorded a fair and full trial, and no reversible error committed by the trial court, the judgment should be affirmed.

POINT I.

The Trial Court Committed No Error in Its Instruction That the Evidence in the Case Is Not to Be Considered by the Jury in Connection With Whether the Arrest and Detention of the Defendant by Navy Personnel, Other Than the Deceased Jepson, and Prior to the Killing, Was Lawful or Unlawful.

A. It Was Immaterial Whether the Arrest and Custody Was Lawful or Not.

The appellant concedes that it is a matter of law whether the arrest of the defendant before the shooting, was legal or not [Appendix B, p. 5 of App. Br.; also Rep. Tr. 600]. The trial court said:

“If you wish an instruction on that, I will instruct them it was legal, but I am telling them that it is immaterial, that is, the acts and conduct of all the other Navy personnel, except Jepson. Now the jury can take into consideration anything they want concerning the acts and conduct of Jepson, because he was the man that was killed.”

It might be urged that this was a mixed question of law and fact,—but appellant insisted at the trial, and republishes his position in above appendix, that it was a matter of law that the arrest was illegal, and that the detention was illegal and that the Court should so instruct the jury. He complains in effect upon appeal that the trial court erred in saying that “when A arrests B, who overpowers A an hour or two later, then shoots C, it was immaterial whether A observed all the technical requirements of law in making that arrest and confinement.”

If the trial court's position on this point was correct, this judgment should be affirmed, for this is the paramount issue on appeal. We must bear in mind that appellant did not then, nor does he now contend this was a question of fact for the jury, whether he was originally arrested and confined according to the letter of the law. We must further bear in mind that the Trial Judge who ruled as he did on the matter, was present during every hour of the trial, heard every word of the testimony, saw every exhibit as it was introduced, and was in command of all the circumstances as this crime was reconstructed for the record. Was he not then, as all trial courts are, in the best possible position to evaluate the course of events, one in relation to another, and to decide when one chapter of the evidence closed and another began? Were there not two and only two chapters here, namely, the series of acts in which appellant was involved from the time he was first observed under suspicious circumstances by the Master at Arms Schoen, to the time he overpowered Ballard, his guard, and took his gun from him; and the second chapter beginning as the defendant now free and master of the situation, stepped back several paces from his former guard, racked the mechanism of the automatic pistol back and threw a live round of ammunition into the firing chamber, held Ballard at bay until a figure of a man appeared near the exit from the enclosure—then he shot that man and took to flight to end this chapter.

In reflection upon the trial court's judgment in denying that in chapter two, it mattered not whether defendant had or had not been lawfully arrested or detained in chapter one, we are constrained to quote the words of

this Court in the case of *Henderson v. United States*, 143 F. 2d (9 Cir.), on June 28, 1944—where it said at page 682:

“* * * Judges and juries do not begin the solution of the complex problems presented to them from a zero of knowledge. They start with the vast common knowledge and understanding possessed by the people. Applying such common knowledge and understanding to the evidence in this case, can there be the slightest doubt about the essentials of this case!”

On the issue of malice aforethought and premeditation with which Barsock killed Navy Chief Jepson, the jury has spoken and called it murder. Notwithstanding, appellant submits that the crime at most amounts to manslaughter. He does not gainsay that he killed Jepson, but his position is in effect that the illegality of his arrest and detention were sufficient provocation as to reduce the offense to manslaughter.

Title 18, U. S. C. A. 453, defines manslaughter as follows:

“Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

“Voluntary—Upon a sudden quarrel or heat of passion.

“Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (R. S. §5341; Mar. 4, 1909, c. 321, §274, 35 Stat. 1143.)”

California Penal Code Section 192 is identical.

Of the two kinds of manslaughter, only the voluntary kind can be considered as applicable. On provocation the law has long been settled that to reduce the killing from murder to manslaughter, the provocation, to be available, must have been reasonable and recent, for no words or slight provocation will be sufficient. (*United States v. Lewis* (C. C. Tex. 1901), 111 Fed. 630.)

Now it is undisputed from the evidence that the deceased was unarmed; that he had no weapon of any kind, that he said nothing whatsoever that anyone could understand between the time he appeared in the driveway and the time he was shot; and that he was several paces distant from defendant at the time of the shooting, estimated to be about 60 feet [Rep. Tr. 373, line 20].

Where, therefore, do we find on the part of Jepson, the recent and reasonable provocation of which the *Lewis* case speaks? Nowhere, and none was ever claimed by appellant. On the other hand, he asserts it is to be found, if at all, in the alleged illegal arrest. If such is the law as applied to the facts of the present case, we bow humbly before that authority. But first let us examine the decisions and especially some of the cases cited by appellant. *40 Corpus Juris Secundum*, 1023, Section 137(b), is cited for the general rule, and he draws up the heavy artillery of the *Starr* and *Brown* cases, cited on page 14 of his brief, as being consistent with this rule. The respondents are then challenged to show any federal authority inconsistent with it. At this point we desire to add a better reasoned and more recent case to those cited, in support of this point, namely, that of *John Bad Elk v. U. S.*, 177 U. S. 529. The latter case was decided in 1900, whereas the *Starr* case was decided 1894 and the *Brown* case in 1895.

Now comes the appellant and cites four leading California cases in support of their position after submitting that there is no federal authority inconsistent with the general rule. We shall see how these cases fared upon appeal. First, it must be noted that each and every one of these cases presents an issue of an illegal arrest by the deceased. That issue is not present under the facts here.

In *People v. Gilman* (1920), 47 Cal. App. 118, 123, 190 Pac. 205 (cited by appellant in his brief at p. 15), the Court said:

“It cannot be doubted that the doctrine contended for by appellant, and stated in the opinion of the court in *People v. Dallen*, 21 Cal. App. 770, 132 Pac. 1064, that ‘where, in resistance to an illegal arrest, the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter,’ finds support in a well-recognized line of authority. (Cases cited.) To admit, however, the application of this doctrine there must be evidence, not only that there was an illegal arrest, but that the killing was done in actual resistance to the act of making the arrest or maintaining the illegal custody of the defendant. It cannot be admitted that a person who is merely formally restrained by a verbal notice that he is under arrest for a misdemeanor can respond by shooting to death the officer, and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint (citing cases).”

The facts in that case were briefly that the decedent, who was a special deputy sheriff, came upon a neighborhood quarrel in which the defendant was involved. He announced he was an officer. The defendant used loud and

profane language toward his neighbor in the presence of women and children, which clearly constituted a breach of peace under California law. The decedent then ordered the defendant from the premises and apparently took him into custody, and went toward defendant's house. Defendant entered his house while the decedent remained outside on the steps, reappeared with a revolver in his hand and killed the arresting officer. The defendant and appellant was convicted before a jury in the Superior Court of San Diego County of murder in the first degree.

In that case the appellant objected to the ruling of the trial court in refusing an instruction in behalf of defendant to the effect that where the evidence shows that a homicide is committed in resisting an unlawful arrest, the defendant on conviction is limited to manslaughter.

The judgment was affirmed in that decision, and the Court had this further to say:

"In this case the arrest was effected by notifying defendant that he was under arrest. Had he at that time resisted, and, in a struggle to regain his freedom, killed the arresting person, there might be room for the application of the doctrine contended for. But the homicide here occurred some time after the arrest, while the defendant was out of the physical control of the officer."

In the case of *People v. Dallen* (1913), 21 Cal. App. 770, 775, 132 Pac. 1064, and cited by appellant on page 15 of his brief, the California Supreme Court had this to say:

"There can be no doubt that a person has the right to resist an unlawful attempt to subject him to arrest (citing *People v. Craig*, 152 Cal. 43, 45 (91 Pac. 997), but the right to oppose an illegal arrest by

resorting to the extreme measure of taking life has never been and never will be laid down as a sound doctrine of the law, except where there exists or appears to exist to the person thus sought to be arrested, at the time the arrest is being attempted, circumstances which being sufficient to excite the fear of a reasonable man, would justify in him the belief that he was about to be injured in body or limb, or that his life was in danger of being destroyed by the party or officer attempting to make the arrest, in which case a perfect defense would be open to the slayer."

The defendant was convicted of the crime of murder of the second degree, and appeals from the judgment. One question raised on appeal pertained to the right of the deceased to arrest the defendant. The judgment was affirmed.

In the *Craig* case, cited above, and on page 15 of Appellant's Brief, the defendant and one Mack, were convicted in the trial court of the crime of assault with a deadly weapon. The principal defense in the trial court was that the attempted arrest of the defendants were illegal and that they were justified in such resistance as they made. The Court reiterated the general rule on the right of resistance to unlawful arrest but held that the arrest was lawful here and resistance not justified, therefore, the judgment was affirmed.

In *People v. Bradley* (1913), 23 Cal. App. 44, 46, 136 Pac. 955, the defendant was convicted of murder in the first degree and sentenced to life imprisonment. The defendant encountered a special policeman, the deceased, in the City of Oakland; the officer was in plainclothes and without any insignia of his office. He halted the defend-

ant by saying "You are under arrest," or "Come with me to the lock-up." The defendant, at first, submitted to arrest and proceeded quietly to accompany the deceased for a short distance until they came to an alley, whereupon the defendant suddenly turned into the alley and immediately cried out to the deceased "Come on and have it out." Without more ado, the defendant fired two shots from a revolver at the deceased, which killed him instantly. Defendant then fled from the scene of the crime and was apprehended several months later. The California Supreme Court had this to say, in affirming the judgment of the trial court:

"We are satisfied that the evidence is amply sufficient to support the verdict of the jury finding the defendant guilty of wilful and malicious murder. Not even the semblance of a legal excuse is shown for the killing of the deceased. It may be conceded that the evidence does not show that the arrest of the defendant was authorized, and that, therefore, it was a trespass against the person of the defendant, which might have been rightfully resisted with the same degree of force employed in making the arrest. The evidence, however, affirmatively shows that no force or show of force was resorted to by the deceased at any time. The mere fact that the deceased failed to reveal his identity as a peace officer, and the further fact that the arrest was apparently unauthorized and not made in strict accord with the forms required by law, may have justified the defendant in breaking the arrest, but such facts alone were wholly inadequate either to justify the killing of the deceased or to reduce such killing from murder to manslaughter."

Thus it may be seen from the foregoing California decisions that the Court paid lip service to the doctrine of the

right to resist an illegal arrest, but found nowhere in these cases where that rule applied and consequently affirmed each and every judgment of the trial court below.

In *People v. Wolfgang*, 192 Cal. p. 754 (1923), another landmark decision of the California Supreme Court, the defendant was convicted of murder in the first degree and sentenced to serve the death penalty. The decedent was a regular patrol man of the Police Department of Los Angeles. The defendant was charged with stealing two bottles of milk. The officer's attention was called to this by a night watchman, specially employed to watch the premises from which the milk was taken. The officer followed the defendant to his lodging house where he apprehended him and placed him under arrest. On the demand of the officer, the defendant produced the bottles of milk he had stolen and the officer thereupon said to him, "Consider yourself under arrest. You have to come along with me." The defendant replied, "Please let me go into my room and get my money first, and then I go along with you." The police man agreed to this but within the room, the defendant later testified, the officer made an unprovoked assault upon him and he feared he was about to be killed, and testified he shot the police man to save himself. Upon the appeal the appellant contends that the Court erred in refusing to give a number of instructions requested by him relating to the authority of the officer to arrest the defendant, and under what circumstances arrests are illegal.

The Court held that the ruling of the trial court for refusing to give the requested instructions was correct. It was not necessary to inform the defendant of the intention to arrest him, for he was pursued and apprehended

immediately after the commission of the offense. Whether or not either the watchman or the deceased officer had authority to arrest the defendant in the first instance became an unimportant question and an immaterial consideration in the light of subsequent evidence. By his own testimony the defendant narrowed the issue to one of self-defense against an alleged unwarranted assault and entirely eliminated any issue or contention that he shot the police man while resisting an illegal arrest. He committed the act after being arrested and while in actual custody of the police man * * * the requested instruction would have interjected a false quantity into the case and would have been confusing to the jury. The judgment was affirmed.

B. The Arrest and Temporary Detention of the Appellant Was Both Lawful and Justified Under the Circumstances.

In *United States v. Travers*, 16 Fed. Cas. 537, cited by appellant in his Appendix A, page 21, we find a similar case to the present one, except that the killing occurred in the actual resistance to an alleged illegal arrest.

In this case Judge Story discussed the question of arrest as follows:

“It is admitted on all sides that it was the duty of Geary and McKim (the two sergeants who attempted the arrest) to preserve the peace of the garrison * * * it was in the night; and if the guard house was the proper place of security it was lawful for Geary and McKim to arrest the defendant and to take him there. They had no right to apply imprisonment as a punishment but they had a right to secure him from doing further mischief and to confine him for a reasonable time before he could be brought before a competent tribunal.”

The facts were briefly that Travers, who had been a mariner in the service of the United States, but whose term of service had expired a short time before, was engaged in tumultuous conduct with other men on a military reservation following a snowball fight. Some of the men were arrested and were ordered to the guard house, but the prisoner remained behind under the pretense that he wanted to take the blanket and some clothing from his bunk. Soon after two sergeants came after him and he resisted, going to the guard house, and threatened their lives. He shot and killed both of them as they attempted to take him into custody.

Section 1515, subsection 1, of Naval Regulations, which is set forth on page 7 of Appellant's Brief, provides:

"The commandant or commanding officer of any naval station or other naval reservation situated within the limits of any State, Territory, or District, which has been acquired by the United States through purchase or otherwise for naval purposes, and over which the United States has exclusive jurisdiction, 'shall require all persons within the limits of such stations or reservations strictly to observe all existing Federal laws, including the penal laws creating offenses not otherwise covered by any act of Congress, of the State, Territory or District, wherein the station is located * * *.'"

Furthermore, this section provides that persons not in the Navy who commit offenses within the limits of such station or reservation, including the offenses contemplated by Section 289 of the United States Criminal Code, are subject to trial in the United States District Court for the district in which the station is situated.

Title 18, U. S. C. A. 468, Criminal Code, Section 289, provides, in part, as follows:

“Laws of States adopted for punishing wrongful acts; effect of repeal. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section 451 of this title, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal shall be deemed guilty of a like offense and be subject to a like punishment; * * *”

Section 415, Penal Code of California, provides in part as follows:

“§415. Disturbing the peace: * * * Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, * * * is guilty of a misdemeanor * * *.”

Also, Title 10, U. S. C. A., Section 1393, reads in part as follows:

“§1393. Protection of the uniform.

“It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps: * * *”

“Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding \$300, or by imprisonment not exceeding six months, or by both such fine and imprisonment: * * *”

However, the appellant insists that he was a civilian at the time which is in dispute. He further asserts that he was not on the reservation at the time of his arrest.

California Penal Code, Section 841, reads as follows:

“Notice of Authority and Intent to Arrest.—The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, *or is pursued immediately after its commission*, or after an escape.” (Italics ours.)

Of course it is urged that appellant was arrested for the first time by the Chief Petty Officer Cox on the road to Long Beach, and was taken to the Security office where he was told he was under arrest and formal charges placed against him as set forth in Exhibit P8.

It must be remembered that the apprehension was one phase of a series of events which began when appellant was observed by Master-of-Arms Schoen in possession of a Navy blanket and he was restrained of his liberty by being taken to the Security Officer. It may be said that the arrest was made at that time and appellant was given an order by the officer to return to his barracks [Rep. Tr. 296]. Thereafter, he moved from barracks to barracks and was observed wearing the clothing bearing the names of at least three other Navy men and again the Master-at-Arms called the Security Officer. Soon after this the

appellant disappeared and climbed over the fence. The second detention was immediately after the commission of further acts of disturbing the peace of the garrison, and after escape, and after immediate pursuit.

There is ample evidence to sustain a charge even against a civilian under California Penal Code, Section 415. But, appellant further asserts that he was arrested without a warrant, which is uncontroverted, and that no felony had been committed up to that time.

California Penal Code, Sections 836 and 837 provide that a peace officer or a private citizen may arrest without a warrant for a public offense committed or attempted in his presence.

Next appellant cites the *Di Re*, 68 Sup. Ct. 222-228, 92 L. Ed. (Adv. Ops.) 218 (1948), case, on page 6 of his brief for the purpose that in the absence of a federal statute, the law of the state where an arrest without warrant takes place, determines its validity. Also, the Court said:

“No act of Congress lays down a general Federal rule for arrests without warrant for Federal offenses. None purports to supersede State law.” (68 Sup. Ct. 227.)

That case may be distinguished on the law and the facts in that defendant *Di Re* was arrested in an automobile without a warrant and without knowledge by the officers of any offense committed, but after being booked was searched and found to possess counterfeit gasoline coupons, which was a misdemeanor. Objection was raised

that the search was unlawful and that the evidence should be suppressed because of an illegal search. The Court so held.

In the present case we have an offense committed upon a military reservation in which the appellant violated the Navy regulations and was punishable thereunder, as a court martial might direct, or was subject to other disciplinary action by the commanding officer, had he been an enlisted man in the Navy. It is undisputed that at the time appellant arrived at the base, and in fact all the time up to and including the shooting it was never made known to Navy authorities that he was a civilian. It is undisputed that he represented that he was Clover, by displaying a liberty card and an identification card of a Navy enlisted man. He was dressed at all times in a regulation Navy uniform. He stated that he had reported that same day from the United States Naval Hospital at Long Beach, California. He stood at attention when the Security Officer returned to his office at the time of the first inquiry.

Therefore, the doctrine of estoppel should apply in a case such as this and appellant should not be heard to deny the authority of the Navy to take him into custody for violation of their regulations. He should not be heard to deny that he submitted himself to their jurisdiction by his conduct and representations. He should not be allowed to hide behind his own deception and claim at this time that the Navy had no authority to call him to account. He must be presumed to have known the Navy

regulations, especially pertaining to theft of Government property, wearing of other men's clothing, prowling about in the area after taps, and leaving his station without proper authority.

It is shown in Appellant's Brief, pages 1 and 2, that he enlisted in the Navy at the age of 17 and was discharged at the age of 22. During that time the Navy regulations must have been brought home to him, for it is noted in Article 20 for the Government of the Navy, Section 10, it is the duty of the Commanding Officer in the Navy to cause the Articles of the Government of the Navy to be hung up in some public part of the ship (or station) and read once a month to his ship's company.

The doctrine of estoppel originated in equity but has been applied in criminal cases. This doctrine has been applied against the Government in the case entrapment and Mr. Chief Justice Hughes in *Sorrells v. United States*, 287 U. S. 435, on page 445, stated:

“When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefore. * * *”

“It is said that where one intentionally does an act in circumstances known to him, and the particular conduct is forbidden by the law in those circumstances, he intentionally breaks the law in the only

sense in which the law considers intent. *Ellis v. United States*, 206 U. S. 246, 257. Moreover, that as the statute is designed to redress a public wrong, and not a private injury, there is no ground for holding the Government estopped by the conduct of its officers from prosecuting the offender. * * *

By like token the doctrine of estoppel should be applied to the appellant in this case and it should be lawfully said that he was subject to arrest by Naval authority. Had the facts been known, and but for his deceit and misrepresentation it would have been clear to Naval authorities as well as a private citizen or peace officer that appellant was guilty of illegally wearing the service uniform during the entire period covering these events. This he knew also, for he had been placed on probation only three days before after conviction in the District Court, based upon this charge.

It is contended by the Government that his concealment of this fact was his prime motive to escape at all cost, even if it were necessary to kill in order to avoid going back to jail, or stand revocation of his probation. This motive could be inferred from appellant's confession [Gov. Ex. 41], also his own testimony while on the stand [Rep. Tr. 538, lines 1 to 3].

At most, it can be said, appellant was detained temporarily and had it been disclosed next morning, had he spent the night in the Brig, that he were a civilian, it would have become the duty of the Commanding Officer to turn him over to civilian authorities.

- C. Even Where the Arrest of a Defendant Is Illegal, Which Is Not Conceded Here, the Prisoner, May Not Resort to the Extreme Measure of Taking Life Unless the Circumstances Exist at the Time of the Arrest Which Are Sufficient to Justify a Reasonable Man in the Belief That His Life Is in Danger, or That He Is in Danger of Great Bodily Harm From the Person or Officer Attempting to Make the Arrest.

Where no force, or show of force, is shown by the person attempting to make the arrest, the homicide is neither justified nor reduced from murder to manslaughter. Therefore, this defendant was not justified in the extreme measure of taking life under such circumstances that were not reasonably sufficient to justify him in the belief that he was about to be injured, or that his life was in danger.

The Law of California has been reviewed in the foregoing cases cited both by the appellant and by the appellee and without exception, this rule of law appears to prevail in California. (*13 Cal. Jur.* Section 36, pertaining to homicide committed during resistance to arrest, p. 628.)

There are cases in other jurisdictions which support this rule which is founded upon justice and reason. Two cases in point are as follows:

Coats v. State, 141 S. W., p. 197 (Ark. 1911);

Reichman v. Harris, 252 Fed., p. 371, in particular at pp. 381 and 382, Note 5.

The *Reichman* case was cited by the appellants in their brief on page 14, for the proposition that one may resist an illegal arrest by using such force as is necessary to regain his liberty and if it reasonably appears that an officer in-

tends to kill him, or to do great bodily harm to prevent his escape, he may kill the officer in self-defense. However, that case was an action by Harris for false imprisonment rising out of alleged unlawful entry of his home and arrest thereafter by Reichman, Lee, and others. Upon the appeal, the judgment was reversed and the Court in its opinion stated in part as follows:

“[5] Further, if Lee’s entry into the house was without justification, still Mathew Harris was not for that reason alone entitled either to kill him or use a deadly weapon to repel him. Although a person may with reasonable force resist an officer attempting unlawfully to arrest him, yet his resistance must be proportioned to the danger threatened. A person has no right to kill an officer seeking to make an unlawful arrest, unless the circumstances lead him fairly and honestly to believe that he is in imminent peril of death or of great bodily harm; he may not resist with a deadly weapon in the absence of well-founded reason to apprehend greater injury than the unlawful arrest.”
Reichman v. Harris, 252 Fed. pp. 381, 382.

In the *Coats* case the defendant was convicted of murder in the first degree after he killed a City Marshal, who attempted to arrest him without a warrant for the offense of selling whiskey without a license. Upon appeal, one issue raised was that of illegal arrest as one of appellant’s defenses. On that point, the Court had this to say:

“An illegal arrest is no more than a trespass to the person. ‘The attempt to take away one’s liberty is not such an aggression as may be resisted with death.

Nothing short of an endeavor to destroy life will justify the taking of life.' 1 Bishop's New Criminal Law, §868; *Creighton v. Commonwealth*, 84 Ky. 103, 4 Am. St. Rep. 193; * * * Wharton on the Law of Homicide (3d Ed.) §407; *Robertson v. State*, 43 Fla. 156, 29 South. 535, 52 L. R. A. 751.

"Mr. Bishop says that the reason why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life may be because liberty can be secured by a resort to the law.

"So it appears that, even in a case where the defendant kills an officer in resisting an illegal arrest, he can only oppose force with force as in other cases where he is assaulted, and, if the circumstances of the killing show that he acted with malice and premeditation, he is guilty of murder in the first degree. In short, he is placed in no better position than is any other person assaulted, and can only kill his assailant, when the danger appears to him as a reasonable person so urgent and pressing that he is in danger of losing his own life or receiving great bodily injury." *Coats v. State*, 141 S. W., p. 197 (Ark. 1911).

The California cases do not stand alone in stating what is believed to be the weight of authority on the question of the reduction of a conviction of murder to manslaughter where there is an illegal arrest or such circumstances present that make the illegality of such arrest and custody immaterial. In the case of *Friedsam v. State*, 116 S. W. 2d 1081 (Tex. Crim. 1938), the appellant was convicted of murder for the killing of a policeman.

According to the evidence, appellant hired a taxi cab driver, drove around for an hour and refused to pay his fare, thereupon the driver called the police who had no warrant of arrest and had not seen any offense committed in their presence.

“Appellant’s only exception to the court’s charge is a complaint that nowhere therein does it ‘Charge the jury the law with reference to an unlawful and illegal arrest,’ and to the same effect is his bill of exceptions No. 3, which charge was refused by the trial judge with the following qualification: ‘Refused for the reason that I did not consider that the evidence as a whole raised the issue of unlawful arrest * * *.’”

“It is the Court’s opinion that the trial judge was correct in his qualification when he said that the evidence did not call for any such charge, nor was appellant entitled to defend on such ground. There was no threat of any arrest; he knew the officers had been called, and they were in his plain view, calmly walking towards the house; they said nothing to him, and he said nothing to them; he knew they were peace officers, and with not a word of warning he shot one of them, thereby causing his death. These two men were there for his protection as well as for the protection of all the public, and * * * it would furnish a precedent that would certainly be dangerous to the lives and safety of police officers to say that when one having been called to come to certain premises, that, under fear of an illegal arrest, one lawfully on the premises had the right to kill such police officer, * * *.”

POINT II.

No Error Was Committed by the Court in Denying Appellant's Motion to Withdraw a Plea of Not Guilty on Count One of the Indictment for Entering a Plea of Former Jeopardy, After the Court Granted His Motion for Acquittal on Count Two.

Jeopardy means the exposure to danger in a criminal prosecution and when a person is put on trial on a charge before a jury, which is sworn to decide the issue between the State or Government and himself, he is exposed to danger in that he is in peril of life or liberty. The rule not only prohibits a second punishment for the same offense, but it goes further and forbids a second trial for the same offense, whether the accused has suffered punishment or not, or whether in the former trial he has been acquitted or convicted.

Kepner v. United States, 195 U. S. 100, 49 L. Ed. 114.

Former jeopardy, according to the old maxim of the Common Law, means that a man shall not be brought into danger of his life or liberty for one and the same offense more than once.

Ex Parte Lange, 18 Wall., U. S. 163, 21 L. Ed. 872.

However, the decisions are based upon the proposition that a defendant has either been tried and convicted or acquitted on a former trial, or has been placed in danger of conviction before a jury which has been empaneled and sworn before he can raise the defense of former jeopardy. Such is not the case in the present matter. The appellant was indicted on two counts for murder, the second count alleging that he killed Navy Chief Jepson during the per-

petration of a robbery, namely, the taking of a United States Government pistol from Edwin Craven Ballard by force and violence. The first count merely alleged that the defendant killed Jepson with malice, aforethought and premeditation. [Clk. Tr. pp. 1 and 2.] At the end of the Government's case, counsel for the defense moved for acquittal on Count Two of the Indictment, and said motion of acquittal was granted by the Court, thereby leaving Count One outstanding to be presented to the Jury for their verdict. Now the defendant and appellant contends that at that point he was entitled to enter a plea of former jeopardy, since both counts alleged the facts sufficient to constitute murder, and since the evidence required to prove each Count was substantially the same. There is no merit to this contention of appellant and no convincing authority is cited therefor in his opening brief.

It has been held that the withdrawal of a Count of an Indictment from the consideration of the Jury amounts to an acquittal of a charge contained in that Count, but does not work an acquittal of a charge contained in another Count.

State v. Hess, 144 S. W. 489, 240 Mo. 147.

Also a dismissal or discontinuance as to one or more counts of an indictment, or as to one of several indictments is no bar to a prosecution on the others.

People v. Kirsch, 269 Pac. 447, 204 Cal. 599;

Bedell v. United States, C. C. A. Iowa. 78 F. 2d 358, Cert. Den., 296 U. S. 628, 80 L. Ed. 447.

See also:

Vol. 22 Corpus Juris Secundum Section 257, P. 393.

Section 380 of Volume 15, American Jurisprudence, at page 53 reads in part as follows:

§380. Necessity that Second Trial be for the same Act and Crime.

The Common Law Rule and the Constitution declaratory thereof against a second jeopardy apply only to a second prosecution for the same act and crime, both in law and fact, for which the first prosecution was instituted.

It was held in the case of *Collins v. Loisel*, 262 U. S., 426 at p. 429 that the Constitutional provisions against double jeopardy can have no application unless a prisoner has theretofore been placed on trial.

“Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing v. Cady*, 208 U. S. 386, 391, not to constitute jeopardy.”

Therefore, since appellant was tried only once for this offense, since he appeared before only one jury, which was empaneled and sworn to hear his case, he was not entitled to a plea of former jeopardy.

POINT III.

The Judgment of the Trial Court Should Be Sustained Unless From a Review of the Entire Record and the Evidence, There Has Been a Miscarriage of Justice.

This Court said in *Henderson v. United States*, 143 F. 2d 681 (C. C. A. 9, 1944), at page 682:

“It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorable to the prosecution, *United States v. Manton*, 2 Cir., 107 F. 2d 834, 839; *Shannabarger v. United States*, 8 Cir., 99 F. 2d 957, 961; *Borgia v. United States*, 9 Cir., 78 F. 2d 550, 555. * * *

Appellant in his opening brief has cited many California cases and statutes in support of his position. The following cases and a section from the California Constitution stand for the principle applicable here that a judgment should be sustained unless there is clear from all the record and evidence that the trial below resulted in a miscarriage of justice.

Art. VI, Sec. 4½, Constitution of California, reads in part as follows:

“No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or re-

jection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Amendment approved October 10, 1911.)

“Miscarriage of justice” can only mean the conviction of a person who is probably innocent.

People v. Fleming, 106 Cal. 357;

From Annotation of Treadwell's Constitution of California.

Under this section, substantial injury as well as error must be made affirmatively to appear for the setting aside of a judgment.

People v. Merritt, 18 Cal. App. 58, 122 Pac. 839.

A case will not be reversed for erroneous instructions where the evidence appears to be conclusive of the guilt of the defendant.

People v. Wong Hing, 28 Cal. App. 230, 151 Pac. 1159.

Since the adoption of this section, injury will no longer be presumed from error, but must appear affirmatively upon an examination of the record or from the intrinsic nature of the error itself.

Cuddahy v. Gragg, 46 Cal. App. 528, 189 Pac. 271.

This section abrogates the old rule that “prejudice is presumed from any error of law, and that where error

is shown it is the duty of the court to examine the evidence and ascertain whether the error did or did not in fact work any injury. This section does not repeal or abrogate the constitutional guarantee, accorded accused persons, but every invasion of even a constitutional right does not necessarily require a reversal.

People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042.

Under this provision it is not sufficient to warrant a reversal to show that error has been committed, but after a view of the whole record, the error must be disregarded and the judgment affirmed unless the appellate court is of the opinion that the error resulted in a miscarriage of justice.

People v. Bartol, 24 Cal. App. 659, 142 Pac. 510.

When the guilt of the defendant is clear, errors will be disregarded.

People v. Sevel, 27 Cal. App. 257, 149 Pac. 1004.

In *Tupman v. Haberkern*, 208 Cal. 256, 280 Pac. 970, the Court said:

“The theory of this section is based upon assumption that the reviewing court *may find error* in the record as a matter of law, and its effect is to release the reviewing court from the rigid rule that prejudice is presumed from error, and to enjoin upon the reviewing court the duty to declare, when confronted in the record with any one or more of the enumerated errors, whether the error found to exist has resulted in a miscarriage of justice, and not to reverse the judgment unless such error be prejudicial. Whether

the error found to be present 'has resulted in a miscarriage of justice' presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it. * * *

In order to show error in refusing an instruction the party must bring before the court sufficient evidence to show that upon a proper instruction there might have been a finding in his favor.

Mintzer v. City of Richmond, 27 Cal. App. 566,
150 Pac. 799.

Unless, after reading the evidence, the court shall be of the opinion that a miscarriage of justice has been caused by an error in giving or refusing instructions, the judgment cannot be set aside.

People v. Sprague, 52 Cal. App. 363, 198 Pac. 820.

Erroneous instruction was held not ground for reversal where guilt appears beyond all reasonable doubt.

People v. Froelich, 65 Cal. App. 502, 229 Pac. 471.

Conclusion.

This is a case in which the evidence is undisputed that appellant shot and killed a Chief Petty Officer, who was on active duty with the United States Navy. There was no reversible error committed by the trial court in the conduct of the trial, or in the Court's instructions given to the Jury. The Indictment was adequate and the appellant had a fair and full trial. There is no reason for setting aside the verdict, and no legal or sufficient cause to reduce the offense from murder to manslaughter. The judgment should be affirmed.

Respectfully submitted,

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No. 12013

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH BARSOCK,

Appellant and Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent and Plaintiff.

APPELLANT'S REPLY BRIEF.

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MAR - 1 1949

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APPELLANT'S REPLY BRIEF.

Appellant sought in the opening brief to present only those cogent reasons based upon various rights which since time immemorial have been accorded to all citizens under the common law. Among these is the right of an individual to be free from unlawful interference with his liberty. Arrests may be made as previously indicated, only under specific circumstances, and then only by certain persons as the situation may point out.

In the instant case it has been deemed by Appellant that the view of the Trial Court and discussions by Appellee in its brief overlook completely the fact that it is highly material whether or not the arrest or detention of any person was lawful or unlawful. As pointed out by the Appellant, the Courts have consistently held to the thought that various offenses committed by a person unlawfully restrained flowing from said unlawful restraint are to be

regarded in a different light than if those same offenses were committed under circumstances other than that of an unlawful restraint.

It is admitted that the arrest of Appellant was made after Appellant was off the Naval Base and not on the Naval Reservation. It flows from this that the entire reserve training program of the armed forces of the United States could be jeopardized in view of the fact that any reserve personnel wearing uniforms in connection with drills might be picked up within a Naval Reservation or off a Naval Reservation by Naval personnel without cause and unlawfully for trivial reasons.

It was for this reason that the Respondent sought to include Count II in its indictment. It will be noted that the Trial Court sustained a motion by Appellant to dismiss said Count II after the full presentation of all evidence; said Count II referred to an alleged killing committed while Appellant was allegedly perpetrating a robbery since Appellee well knew that there could be no basis for arresting of Naval personnel, especially off a Naval Reservation, except perhaps under such circumstances as were alleged to have been committed under Count II of the indictment.

Appellant feels that he has thoroughly presented in his opening brief the issues involved and reasons in support of Appellant's various contentions. Appellant contends that Respondent's Brief, while learned and certainly representative of a great deal of admirable intellectual effort, fails to meet Appellant's contentions especially as regards the point with regard to the instructions to the jury so far as evidence to be considered in connection with whether the arrest and detention of defendant was lawful or unlawful.

As a matter of fact, the efforts of Respondent to seek to establish the point that the arrest and temporary detention was lawful is of little relevance where the Court has, by its instructions, wrongfully made this issue immaterial. That a citizen may be estopped to assert his constitutional rights is ridiculous.

But even over and beyond these points there are further basic factors which Appellant is sure merit the attention of this Honorable Court and Appellant does herewith solicit this Court's attention to these points.

Firstly: In our system of civilization and especially in the United States of America, the dignity and worth of every individual and his equality with every other individual, is theoretically protected by appropriate Constitutional provisions and are generally assumed to be true. However, it would seem readily apparent to all who are aware of the vastly complex nature of our social structure and the tremendous problems of our times that there are some who have lesser opportunities and cannot act at all times with that complete freedom with which every citizen is supposedly invested.

And, unfortunately, this means that certain individuals in our country do not receive adequate environmental background nor sufficient education to prepare them for so many of the problems which even well adjusted and integrated persons meet often only with great difficulty.

Reference is made here specifically to the fact that Appellant is a Negro. At this point Appellant thanks

both the Trial Court and all persons and witnesses engaged in the trial of this matter for having acted toward him at all times with courtesy, fairness and with fullest recognition of all Appellant's rights. However, Appellant, as pointed out in his examination before the Court, was born in a poor section of the South into a family in which the home was subsequently broken up. His education was limited and not even by our standards, rudimentary. Then along comes the war and his participation therein as a Steward's Mate in which he had little additional opportunity to develop the concept of the dignity of man.

In the light of these basic thoughts concerning the character and background of Appellant and in the light of testimony adduced, it is inconceivable that Appellant could have acted from the motives requisite to sustain the verdict brought in by the jury.

When further consideration is given to the fact that the only witness whose testimony is at all relevant, namely, Ballard, was himself another of the products of these troublous times, inexperienced both as to handling of that deadly weapon which was entrusted to his care and as to the nature of punishments which might be inflicted upon him for his having been derelict in his duty, it would again seem inconceivable that Appellant could have acted from the requisite motives.

It is not the number of witnesses but the quality of the testimony that in the last analysis justifies any particular finding. It is comparatively simple to take diverse threads of evidence and weave therefrom a coherent pattern of

evil motives as was done by Respondent with its many, many witnesses. Yet, stripped to its essentials, no witness was in the position to know exactly what happened except the lad Ballard, frightened, uncertain and by the time of trial fairly convinced that everything to which he testified was exactly as it occurred in that uncertain, breathless, unhappy moment.

Appellant contends, therefore, even in accordance with Respondent's views as set forth in its brief on Point 3 that a miscarriage of justice has resulted in the instant case.

There was no effort on the part of Appellant at that time to deny the basic facts of the shooting. It is only with his state of mind that we are properly concerned, for hinging thereon assuredly lies the true verdict.

Philosophers, psychiatrists, metaphysicians and various and sundry scientists and pseudo-scientists as well as lawyers have struggled in vain to know precisely exactly what the "intention" of a party was with regard to any particular transaction. To find as was done here that Appellant acted from the vicious motives attributed to him in the light of the specific testimony of the lad Ballard, seems to be a miscarriage of justice.

The every action of Appellant subsequent to the alleged shooting points to a confused, scared individual, acting primarily from stupidity in breaking a car window with the butt of a gun which can go off from lesser shocks and lastly, falling asleep in, of all places, a naval vessel.

Conclusions.

1. There was a reversible error committed by the Trial Court as to instructions given to the jury by the Court, for the legality of the arrest went to the matter of degree. No estoppel was involved.

2. The verdict of the jury was in view of all the factors surrounding the character of the pertinent witnesses and evidence presented, was clearly wrong as to the degree of the crime, representing therefore a miscarriage of justice. The judgment should therefore be reversed and such action taken as to this Honorable Court seems properly consistent with the record and briefs filed therefrom.

Respectfully submitted,

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Attorneys for Appellant.

United States
Court of Appeals
for the Ninth Circuit

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,
Appellant,

VS.

CECIL L. WRIGHT,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

SEP 11 1948

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,
Attorney for Respondent and Appellant.

CECIL L. WRIGHT,
Box 579—PMB,
Alcatraz, California,
In Propria Persona.

To the Honorable William Denman, United States
Circuit Judge in and for the Ninth Judicial
Circuit, San Francisco, California.

No. 28026

CECIL L. WRIGHT,

Petitioner,

v.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
AD SUBJICIENDUM

The Verified Petition of Cecil L. Wright for a
Writ of Habeas Corpus Ad Subjiciendum respect-
fully shows your Honor that:

I.

Your petitioner is unlawfully restrained of his
liberty by James A. Johnston, Warden of the
United States Penitentiary at Alcatraz, California;
the body of your petitioner, the said James A. John-
ston and the said United States Penitentiary at
Alcatraz, California, are all, and each of them,
within and subject to the jurisdiction of the Hon-
orable William Denman and the Ninth Judicial
Circuit.

II.

Petitioner is entitle to file this petition under
the authority of and in conformity with the provi-
sions contained in Title 28 U.S.C.A., Sections 452
et seq., and in re Wright, 9 Cir., 51 F. Supp. 639,-

644. See also *Wright v. Johnston*, 9 Cir., 74 Supp. 25, 26. Petitions like the instant one have been presented to the United States District Court for the Northern District of California, Southern Division Thereof. The last petition was filed on January 8, 1948, assigned to [1*] District Judge Harris and in accordance with the practice established in *Walker v. Johnston*, 312 U.S. 275, an order to show Cause issued. On January 26, 1948, the respondent filed his return to order to show Cause alleging that petitioner had filed nine petitions for Writ of Habeas Corpus and that the instant petition before the Court should be denied upon the authority of *Swihart v. Johnston*, 9 Cir., 150 F. (2d) 721, Cert. denied, 327 U.S. 789.

Upon the question of denial of the effective assistance of Counsel it is clear that the trial Court deprived the petitioner of Constitutional right to choice of Counsel at the time of trial. The case of *Glasser v. United States*, 315 U.S. 60, sustains petitioner's claim of deprivation of rights guaranteed by the Sixth Amendment to the United States Constitution, *Swihart v. Johnston*, *supra*, suspends the use of the Writ of Habeas Corpus in violation of Article 1, Section 9, Clause 2. The Court in the *Swihart* Case was without jurisdiction to pass upon a petitioner's right to petition for Writ of Habeas Corpus, that is, the Constitutional right to file petition for Writ of Habeas Corpus invokes of itself

* Page numbering appearing at foot of page of original certified Transcript of Record.

the right to litigate the issues. The Swihart case was an example of an ignorant inmate that sought petition for Writ of Habeas Corpus without knowledge of appeal procedure. In filing the second petition for Writ of Habeas Corpus it was Swihart's belief that he could obtain relief on his second petition without an appeal from the order of judgment on the first. But in such attempt on his second petition in appeal from the second judgment, the Circuit Court by its action rendered decision suspending the use of the Writ of Habeas Corpus. Such action of the Ninth Circuit in the Swihart case violates due process of law. Supposing a petitioner filed petition for Writ of Habeas Corpus in the California District Court upon question of denial of Constitutional rights under the Federal Constitution and the District Court denied the relief sought by such petition. In the next year the Supreme Court ruled in favor of the question in another case; the petitioner's attempted to re-litigate the issue would be shut off by the holding under the Swihart decision [2]

In the case at bar the questions here were reserved in *Johnston v. Wright*, 9 Cir., 137 F. 2d 914, 918, therein the Court held:

"The appellee alleges other reasons for his release. They were not all ruled upon. In the view we entertain of this proceeding, it will not be useful to give attention to these issues." (Emphasis Petitioner's.)

In the respondent's return before District Judge Harris it was alleged that petitioner had filed nine

writs. He incorporates all the petitions filed prior to *Johnston v. Wright*, *supra*, including the findings before Judge St. Sure in case No. 23647-S all of which were before the Circuit Court in *Johnston v. Wright*, *supra*.

Petitioner attaches hereto and incorporates into this petition the petition for Writ of Habeas Corpus filed by before Judge Harris, the Warden's return and memorandum, the petitioner's demurrer and petition for Writ of Habeas Corpus *ad prosequendum ad testificandum*, designated as petitioner's Exhibit A, and by reference made a part hereof as though fully set forth at length word for word.

III.

FACTS INVOLVED

On September 16, 1930, petitioner was brought before United States District Court for the Eastern District of Illinois, Danville Division, hereinafter called the "trial Court", under a Writ to Habeas Corpus *ad prosequendum* and upon arraignment he entered pleas of not guilty to two indictments theretofore returned and filed in the aforesaid trial Court. The aforesaid trial Court appointed one attorney to defend the petitioner and four other defendants jointly indicted. The appointment of Counsel was not made in open Court and petitioner was without knowledge that such counsel was a colored attorney. That in the late afternoon of September 16, 1930, appointed counsel came to the Vermilion County Jail and stated that the aforesaid trial Court had appointed him to represent all the defendants. Petitioner [3] states that he did

not desire to be represented by the appointment of colored counsel that had been selected by the Court. Appointed counsel stated that he would take the matter up with the Court the next morning but was unable to do so at that time as the Court was closed.

On September 17, 1930, petitioner and four co-defendants appeared in Court and appointed counsel stated that he could not effectively represent petitioner because the evidence to be introduced by the respective parties would be highly conflicting. Appointed counsel stated that it was petitioner's desire to employ counsel of the white race and that if the Court would grant a reasonable continuance that petitioner would employ counsel to prepare his defense. The Court refused to allow petitioner to employ counsel and stated that no time would be permitted for preparing a defense. Petitioner filed an affidavit in the aforesaid trial Court and moved for continuance to enable petitioner to secure the attendance of his witness as guaranteed by the compulsory process clause to the Sixth Amendment to the United States Constitution; and further advised the trial Court that the issue involved in said cause would be highly conflicting as to the evidence to be introduced by the respective parties; a copy of such affidavit reads in words and figures, to-wit:

HEADING OMITTED

Tuck Wright, one of the above named defendants, makes oath and says that he cannot safely proceed to trial of this cause at the present term of this

Court on account of the absence of one Glen Rommel and one Mary Rommel both of whom are material witnesses for the defendant in said cause and whose residence is 715 South Oakland Court, Decatur, Illinois. That this affiant expects to prove—by said witnesses, Glen Rommel and Mary Rommel, the following matters, all of which are material to the issue involved in said cause: That the affiant was not in Strasburg, Illinois, on the 9th day of April, 1930, when the Post Office at said place was burglarized; that this affiant was severely injured and was in the City of Decatur under the care of one Doctor McGill, and was not at or near the scene of the supposed crime; that all the [4] matters and things which the defendant expects to prove by the said Glen Rommel and Mary Rommel, are true.

And this affiant further says that he tried to communicate with the said Glen Rommel and Mary Rommel by writing letters out of the Southern Illinois Penitentiary but was prevented from doing so by the rules of said institution which forbid inmates to write more frequently than once in two weeks. This affiant further says that he is informed and believes that the issue involved in this cause will be controverted, and that the evidence relating to such issue will be highly conflicting, as introduced by the respective parties, and that he knows of no other person or persons than the said Glen Rommel and Mary Rommel by whom he can so fully prove the above matters set forth, and this affiant further says that he expects to and believes

that he will be able to procure the attendance and testimony of the said Glen Rommel and Mary Rommel at the next term of this Court.

And this affiant further says that the said Glen Rommel and Mary Rommel are not absent by the procurement, connivance or consent of this affiant, either directly or indirectly and that this application is not made for delay, but that justice may be done.

/s/ CECIL WRIGHT,
Affiant.

Subscribed and sworn to before me this 17th day of September, A.D. 1930.

/s/ D. H. REED,
Clerk of the United States District Court.

Petitioner alleges that the trial Court denied the above affidavit; that your petitioner entered motion for separate trial which motion was denied by the trial Court. Petitioner was forced to trial and convicted and sentenced for terms totaling ten years and to pay a fine of ten thousand dollars; a true and certified copy of the judgment and sentence is hereto annexed, designated petitioner's Exhibit A, and by reference made a part hereof as though fully incorporated herein at length. [5]

Petitioner alleges that in another case he withdrew his plea of not guilty and entered a plea of guilty thereto and was sentenced for a term of five years; a true and certified copy of the judgment and sentence is hereto annexed, designated peti-

tioner's Exhibit B, and by reference made a part hereof as though full incorporated at length.

That on June 25, 1944, your petitioner was delivered into federal imprisonment by order of commitments issued by the trial Court on June 21, and on June 22, 1944. Petitioner started service of sentence on June 21, 1944, and has fully completed and discharged the sentence of five years, petitioner's Exhibit B, and with allowance of good time as provided by law (18 U.S.C.A. Section 710) plus one hundred thirty-three industrial earned good days (18 U.S.C.A. Section 744h) such five years of federal sentence did expire on October 8, 1947, and petitioner not being subject to conditional release is entitled to discharge if his contention be sustained that the ten year sentence is void.

In *Zerbst v. Murphy*, 5 Cir. 92F. (2d) 671, the Court held: "This section has no application to a sentence imposed prior to its enactment." *Certiorari denied Murphy v. Zerbst*, 58 S. Ct. 749, 82 L. Ed. [6]

IV.

PETITIONER'S CONTENTIONS

(1) It is the contentions of your petitioner and he alleges that the judgment and sentence, petitioner Exhibit A, is void without due process of law in violation of and contrary to the Fifth and Sixth Amendments of the United States Constitution, in that:

(a) The trial Court, denied your petitioner the effective and undivided assistance of counsel at the

time of trial by jury and likewise denied petitioner sufficient time to prepare his defense, and:

(b) The trial Court denied your petitioner compulsory process of law to obtain his witnesses and forced petitioner to trial within twenty-four hours after his arraignment.

(2) It is the contentions of your petitioner and he alleges that the judgment and sentence, petitioner's Exhibit B, has been lawfully served and he is entitled to collaterally attack the judgment and sentence, petitioner's Exhibit A in that:

(a) His Honor Judge Denman held in re Wright, 9 Cir., 51 F. Supp. 639, 644, that:

Wright's incarceration in Leavenworth and Alcatraz before his federal sentences commenced, has been without authority. His proof of the facts has made no value to him the several years spent there which, with good behavior credits, nearly fulfilled his five year sentence. His fifteen years of federal sentences will have to be served after the termination of the Illinois sentence, unless his contention be later maintained that his ten year sentence is invalid. (Emphasis Petitioner's.)

Wright claims the ten year federal sentence is void because the attorney assigned him by the District Court also represented other persons tried with him who had given confessions used at the trial, which confessions involved his participancy in the crime charged. He claims such an attorney would prejudice him with the jury and that he would not

be free to conduct a defense with the singleness of purpose the law requires.” (Emphasis Petitioner’s.) *Glasser v. United States*, 315 U.S. 60.

Your petitioner therefore contends and alleges that the District Court of San Francisco, California, has passed upon the questions presented here and decided adversely to petitioner’s contentions, and upon the authority of *Swihart v. Johnston*, 9 Cir. 150 F (2d) 721, [7] petitioner cannot apply to the District Court for another Writ of Habeas Corpus, even though the records of the District Court of the United States of America in and for the Eastern District of Illinois, Danville Division thereof, denied your petitioner his Constitutional rights to have the effective and undivided assistance of his counsel at the time of trial by jury in Case No. 11032, petitioner’s Exhibit A, and likewise denying your petitioner his Constitutional rights to have compulsory process of law to obtain witnesses in his favor as well as denied to your petitioner sufficient time to prepare his defense, and that the aforesaid judgment and sentence was void ab initio and petitioner’s detention and imprisonment are void in violation of and contrary to the Fifth and Sixth Amendments to the United States Constitution.

V.

THE LAW AND THE ARGUMENT

Petitioner respectfully contends and urges that the judgment and sentence, petitioner’s Exhibit A, is void because he was denied the effective and undivided assistance of his counsel at time of trial.

In *Glasser v. United States*, 315 U.S. 60, the Supreme Court of the United States held:

“The assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. To preserve the protection of the Bill of Rights for hard pressed defendants, every reasonable presumption against a waiver of fundamental rights is indulged.” (Emphasis Petitioner’s.)

Petitioner contends and respectfully urges that the Court’s appointment of counsel was made at such a time that he could not prepare his defense. That such appointment of counsel was made for the defense of petitioner and four other defendants that had been jointly indicted.

In *Powell v. Alabama* (Emphasis Petitioner’s), 53 s. Ct. 55, the Supreme Court decided that: “That the guaranteed right to the assistance of counsel includes a fair opportunity to an accused to secure
counsel of his own choice and to have the effective and substantial aid of counsel (Emphasis Petitioner’s), and also decides that the failure of a trial court to make an effective appointment of counsel is a denial of due process within the meaning of the Fourteenth Amendment.”

And in: *Johnson v. Zerbst*. 304 U.S. 458, 466, 58

S. Ct. 1019, 1024-82 L. Ed. 1461, the Supreme Court decided that: [8]

“Congress has expanded the rights of a petitioner for a writ of habeas corpus * * *. There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus * * * in results that under the sections cited a prisoner in custody * * * may have a judicial inquiry * * * into the very truth and substance of the causes of his detention * * *. Such a judicial inquiry involves the reception of testimony, as the language of the statute shows.” (Emphasis Petitioner’s.)

Petitioner contends that his allegations are not inconsistent with recital of the certified copy of the affidavit and the judgment and sentence of the trial court and must be taken as true.

Williams v. Kaiser, 65 S Ct. 363;

Tomkins v. State of Missouri, 65 S Ct. 370.

Petitioner contends that the trial court denied him due process of law as the affidavit was made so that the petitioner could subpoena witnesses and prepare his defense.

In Hawk v. Olson, 66 S. Ct. 116, The Supreme Court decided that:

“Petitioner contends that his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense. Denial of effective assistance of counsel

does violate due process.”

Petitioner urges that the trial court records show that the trial court appointed one attorney to represent the petitioner and four other defendants. That within twenty-four hours the trial court forced all the defendants to trial which denied petitioner the opportunity to subpoena witnesses, consult counsel and prepare his defense. Such colored counsel was not the choice of petitioner and although petitioner did object to a colored attorney the trial court burdened appointed counsel by making appointments of the same counsel to represent four other defendants. Petitioner and four others were indicted for conspiracy to violate Sections 315 and 313 of Title 18 U.S.C.A. The Supreme Court of the United States in a decision that is in point and controlling here said:

“The right of an accused to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations concerning the amount of prejudice arising from its denial.”

Glasser v. United States, 315 U.S. 60. [9]

And

Wallack v. Hudspeth, 10 Cir., 128 F. (2d) 343, at page 345, the Court said

“In reaching prompt disposition of criminal cases, a defendant, charged with serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.” (Emphasis Petitioner’s.)

In

Wood v. United States, 128 F (2d) 265, at page 271, the Court said:

“The Constitutional ‘right of accused’ to counsel includes time for adequate preparations and extends to every step in the proceedings against the accused.” U.S.C.A. Const. Amend. 5. (Emphasis Petitioner’s.)

And in

Thomas v. District of Columbia, 67 App. D. C. 179, 90 F. (2d) 424, the Court said:

“Under the Sixth Amendment guaranteeing that in criminal prosecutions the accused shall enjoy the right to have the assistance of counsel and the ‘due process of law’ clause of the Fifth Amendment, ‘Assistance of counsel’ means effective assistance.” (Emphasis Petitioner’s.) U.S.C.A. Const. Amends. 5, 6.

The Supreme Court of the United States in Avery v. Alabama, 308, U.S. 444, 447, 60 S. Ct. 322, 84 L. Ed 337, decided that:

“That the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel. The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment. That where denial of the constitu-

tional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record.”

Again in *Glasser v. United States*, *supra*, the Court, speaking through Mr. Justice Murphy said:

“In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may and sometimes do operate unfairly against an individual, it is especially important that the defendant be given the benefit of the undivided assistance of his counsel without the Courts becoming a party to encumbering that assistance. U.S.C.A. Const. Amend. 6. That in prosecutions for conspiracy to defraud the United States, where the trial court, though advised of the possibility that conflicting interests might arise which would diminish an attorney’s usefulness to defendant for whom attorney had entered his appearance as [10] associate counsel, appointed attorney as codefendant’s counsel, evidence showed that attorney’s representation of defendant was not as effective as it might have been had the appointment not been made. and the Court thereby denied defendant his right to have the effective ‘assistance of counsel’ guaranteed by the Sixth Amendment. (Emphasis Petitioner’s.) Cr. Code Section 37, 18 U.S.C.A. Section 88—U.S.C.A. Const. Amend. 6. An accused’s desire to have the benefit of the undivided assistance of counsel of his own choice should be respected. The right of an accused to have the assistance of counsel is

too fundamental and absolute to allow court's to indulge in nice calculations concerning the amount of prejudice arising from its denial. The trial judge has the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused, and he should protect the right of an accused to have the assistance of counsel. The assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interest. To preserve the protection of the Bill of Rights for hard-pressed defendants, every reasonable presumption against a waiver of fundamental rights is indulged. Though an accused may waive the right to assistance of counsel, whether there is a proper waiver should be clearly determined by the trial court. The guarantee of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power, * * * deemed necessary to insure fundamental human rights of life and liberty. And a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel, *Johnson v. Zerbst*, 58 S. Ct. 1019; *Powell v. Alabama*, 53S Ct. 55; To preserve against the waiver of fundamental rights, *Aetna Insurance Co. v. Kennedy*, 57 S. Ct. 809; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 57 S. Ct. 724."

Petitioner respectfully urges that the trial court deprived him of the effective and undivided assistance of his counsel at the time of trial. That ap-

pointed counsel could not effectively represent petitioner in that the appointment was burdened by the court, that is, the trial court appointed the same counsel to represent four other defendants that had been jointly indicted with petitioner.

In *re Wright*, 9 Cir, 51 F. Supp. 639, 644, His Honor said [11]

“Wright claims the ten year federal sentence is void because the attorney assigned him by the District Court also represented other persons tried with him who had given confessions used at the trial, which confessions involved his participancy in the crime charged. He claims such an attorney would prejudice him with the jury and that he would not be free to conduct a defense with the singleness of purpose the law requires.” *Glasser v. United States*, 315 U.S. 60.*

In accordance with *re Wright*, *supra*, 51 F. Supp. 639, 644 petitioner is entitled to the writ of habeas corpus so as to prove his contention that he was deprived of the effective and undivided assistance of counsel at time of trial. The United States Circuit Court of Appeals for the Ninth [12] Circuit failed to pass upon these issues raised from the opinion (51 F. Supp. 639, 644) *Johnston v. Wright*, 9 Cir., 137 F. 2d 914, 918.

Petitioner respectfully contends and urges that the trial court denied him compulsory process for obtaining witnesses in his favor, which was denial of a right constitutionally guaranteed by the Sixth Amendment to the United States Constitution. The

affidavit incorporated herein as heretofore urged is evidence in and of itself that petitioner was denied compulsory process for obtaining witnesses in his favor. For a case in point see

In *Paoni v. United States*, 281 F. 801, the Court of Appeals for the Third Circuit held:

“One of the important guarantees of fair trial, as provided in the Sixth Amendment, is that an accused person shall enjoy the right ‘to have compulsory process for obtaining witnesses in his favor. This right includes a reasonable time in which to procure witnesses; and it has been held that refusal by the court to grant a continuance so that certain witnesses could be summoned was an abuse of discretion and a denial of the right guaranteed by the Constitution.”

And *Hawk v. Olson*, *supra*, the Supreme Court holding:

“Petitioner contends that his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense. Denial of effective assistance of counsel does violate due process.”*

Petitioner respectfully contends and urges that the judgment of conviction was void in the beginning and that the trial court was without jurisdic-

tion to proceed to judgment and sentence. *Johnston v. Zerbst*, *supra*.

That prior applications have been made to the District Court. *Sec. in re Wright*, 9 Cir., 51 F. Supp. 639, 644. Another petition in the District Court would be condemned under the ruling in *Swihart v. Johnston*, 9 Cir., 150 F. (2d) 721, and *Price v. Johnston*, 9 Cir., 161 F. (2d) 705. That for [13] reasons stated in *re Wright*, *supra*, petitioner is entitled to envoke the discretionary power conferred upon the Honorable William Denman, 28 U.S.C.A. Sections 452 et seq.

Wherefore, to be relieved of the said unlawful detention, restrain and imprisonment, as aforesaid, your petitioner prays that this petition for Writ of Habeas Corpus be granted and that your Honor make his order directing the aforesaid James A. Johnston, Warden of the United States Penitentiary at Alcatraz, California, to appear before His Honor at a time and occasion thereat to be set forth to show Cause, if any he have, why the foregoing petition should not be granted and why a Writ of Habeas Corpus should not be issued as here prayed.

Respectfully Submitted,

CECIL L. WRIGHT,

Petitioner pro se.

United States of America,
State of California,
County of San Francisco—ss.

Cecil L. Wright, being first duly sworn, deposes and says that: He is a citizen of the United States of America, by birth, and of legal age; He is the petitioner, named in the foregoing petition for Writ of Habeas Corpus ad Subjiciendum; he has read the same and knows its contents; the same are true and correct.

(Seal) CECIL L. WRIGHT,
 Affiant.

Subscribed and sworn to before me this 3rd day of March, 1948.

P. J. MADIGAN,
Associate Warden.

Associate Warden, authorized by the Act of February 11, 1930, to administer oaths. [14]

Records at U. S. Penitentiary, Alcatraz, California, indicate that Cecil L. Wright is a citizen of the United States.

EXHIBIT A

In the District Court of the United States for the Eastern District of Illinois. Wednesday, September 17, 1930.

Present: Honorable Walter C. Lindley, Judge.

No. 11032

THE UNITED STATES

vs.

ROBERT RAYMOND, CARL SANDERS, JOSEPH HARTMAN AND TUCK WRIGHT

INDICTMENT VIOLATION OF POSTAL LAWS

1st—Breaking into Post Office 18 USCA 315.

2nd—Stealing Govt. Property (18 USCA) 313.

3rd—Conspiracy.

And now on this 17th day of September, A. D. 1930, comes the United States, the plaintiff in this case, by Harold G. Baker, United States Attorney for the Eastern District of Illinois, and comes also the defendant, Robert Raymond, Carl Sanders, Joseph Hartman and Tuck Wright, each in person, and by J. D. Allen their attorney. And now comes the defendant, Tuck Wright, by his said attorney, and enters motion for a continuance, which said motion is by the court denied, and now comes the said defendant and enters motion for separate trial, which said motion is by the court denied, and issue being joined, the following named jurors are ten-

dered and accepted to wit: Stephen Gannon, H. R. Boeschen, G. W. Gilliland, Oscar Forth, D. C. Burrow, Sam Wilson, Harry Beard, Mark Wiseman, William Basinger, Charles Tilton, Dan Fritz and J. W. Snider, who are duly sworn to well and truly try the issues joined in this case and a true verdict render according to law and evidence. And after hearing the evidence in the case, the argument of counsel, and the instructions of the Court, the jury retire to consider their verdict, and afterward come into court and for verdict say: "We, the jury find the defendants, Carl Sanders, Tuck Wright, Joe Hartman and (15) Robert Raymond guilty in manner and form as charged in the indictment." And the said defendants being arraigned at the bar of the court for sentence and they having nothing further to say why sentence should not be pronounced against them, it is, therefore considered and adjudged by the Court that the said defendants Robert Raymond, Carl Sanders, Joseph Hartman and [15] Tuck Wright, for the offense by them committed in manner and form as charged in the said indictment and as found by the jury in this case each be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the period of five years on the 1st count of the indictment, three years on the 2nd count and two years on the 3rd count, from the date of delivery of the said defendants to the Keeper or Warden of the said Penitentiary, said sentences to run and be served consecutively; that they each pay a fine to the United States in the sum of Ten Thousand Dollars,

that execution issue therefor and that the said defendants stand committed to the said Penitentiary until said fines shall have been fully paid.

(It is further ordered by the court that the sentences herein imposed shall begin upon the expiration of the sentences which the said defendants are now serving in the Southern Illinois Penitentiary.)

(Entry made by Clerk of District Court.) (16)

United States of America,
Eastern District of Illinois—ss.

I, D. H. Reed, Clerk of the District Court of the United States for the Eastern District of Illinois, do hereby certify the foregoing to be a true copy of an order made and entered in said Court on the 17th day of September, A.D. 1930, as fully as the same appears upon the records now in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court, at Danville in the District aforesaid, this 17th day of September, A.D. 1930.

(Seal) /s/ D. H. REED,
Clerk. [16]

EXHIBIT B

In the District Court of the United States
for the Eastern District of Illinois

Wednesday, September 17, 1947

Present: Honorable Walter C. Lindley, Judge.

No. 11074

THE UNITED STATES

vs.

MONTE CRIST, CECIL WRIGHT, alias TUCK
WRIGHT and MARION BOWLES

INDICTMENT

Violation National Motor Vehicle Theft Act
1 Count, Transportation, 18 U. S. C. A. 408.

And now on this 17th day of September, A.D. 1930, comes the United States, the plaintiff in this case, by Harold G. Baker, United States Attorney for the Eastern District of Illinois, and comes also the defendants Cecil Wright alias Tuck Wright and Marion Bowles, each in person, and by J. D. Allen, their attorney. And now comes the defendant, Cecil Wright alias Tuck Wright, and by leave of court withdraws his plea of not guilty heretofore entered herein, and instead thereof says that he is guilty in manner and form as charged in the indictment. And now issues being joined as to the defendants, Marion Bowles, and jury being waived, his case comes on for hearing before the court, and after hearing the evidence in the case and the argu-

ments of counsel and being fully advised in the premises, the court finds the defendant, Marion Bowles guilty in manner and form as charged in the indictment. And now the said defendants, Cecil Wright, alias Tuck Wright and Marion Bowles being before the court for sentence and having nothing to say why sentence should not be pronounced against them—It is therefore, considered and adjudged by the court, that the said defendant Cecil Wright alias Tuck Wright, for the offense by him committed in manner and form as charged in the indictment, and as by him confessed, be imprisoned in The United States Penitentiary at Leavenworth, Kansas, for the period of five years, said sentence [17] to run and be served consecutively with the sentence imposed against the said defendant in case No. 11032, and that said defendant be committed to said Penitentiary pursuant to said sentence. And it is considered and adjudged by the court that the defendant, Marion Bowles, for the offense by him committed, in manner and form as charged in the indictment and as found by the court, be imprisoned in The United States Penitentiary at Leavenworth, Kansas, for the period of five years from the date of delivery of the said defendant to the keeper or warden of said Penitentiary, said sentence to begin upon the expiration of the sentence which the said defendant is now serving in the Southern Illinois Penitentiary, and that the said defendant be committed to the United States Penitentiary pursuant to said sentence.

United States of America,
Eastern District of Illinois—ss.

I, D. H. Reed, Clerk of the District Court of the United States for the Eastern District of Illinois, do hereby certify the foregoing to be a true copy of an order made and entered in said Court on the 17th day of September, A.D. 1930, as fully as the same appears upon the records now in my office.

In testimony thereof, I have hereunto set my hand and affixed the seal of said court, at Danville in the District aforesaid, this 17th day of September, A.D. 1930.

[Seal] /s/ D. H. REED,
Clerk.

[Endorsed]: Filed April 23, 1948. [18]

(Here follows petition for writ of habeas corpus ad subjiciendum in Case No. 27833 H, Cecil L. Wright, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Respondent, and Exhibits A and B (Commitments in No. 11032 and No. 11074, previously copied), and Order to Show Cause, Return to Order to Show Cause, Memorandum of Points and Authorities, Demurrer to Return on Order to Show Cause, Petition for Writ of Habeas Corpus ad Pro-

sequendum ad Testificandum and Order (Denying Petition and Discharging Order to Show Cause) in the said case and not copied except as to the two Exhibits.

[Endorsed]: Filed April 23, 1948. [19]

[Title of U. S. Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

The petition alleges that petitioner, in September, 1930, was tried by the United States District Court for the Eastern District of Illinois, upon an indictment charging him and three other defendants with breaking into a federal post office and stealing government property in violation of 18 U.S.C. 313 and 315, and with conspiracy to commit such violations, and that the court appointed a single attorney for the four defendants.

The petition further alleges that on the opening of the trial petitioner's attorney moved for a separate trial on the ground that the evidence to be offered on behalf of the attorney's other clients would be highly conflicting with petitioner's evidence of an alibi set forth in petitioner's affidavit there filed. The motion was denied. The attorney also moved for a continuance to procure the witnesses who would testify to establish the alibi, a motion also denied.

The petition further alleges that, as stated in the motion to relieve the attorney from representing

petitioner at that trial, such evidence was offered by the prosecution early in the presentation of its case against the four defendants. This evidence consisted of the statements signed [20] by the three other clients of the attorney, implicating petitioner in the offenses charged.

The single attorney for these four clients thus had in evidence the statements of three of them adverse to the fourth, the petitioner. On the facts alleged in the petition, the professional absurdity of his position is obvious. To the jury he must argue, "As to three of my clients, they are innocent men." At the same time, he must argue for petitioner that "each of my three innocent clients lied when he signed statements implicating Wright," or, "the court may instruct you to ignore the statements of my three clients and hence you must regard them as if they were untrue." If not before, immediately upon the introduction of the statements of the three defendants adverse to the petitioner, he should have had separate counsel, or, if too late for counsel to prepare his defense, a mistrial as to him should have been declared and a separate trial ordered.

There could not be a clearer case of failure to provide counsel which would give his client the "effective" aid of *Powell vs. Alabama*, 287 U. S. 45, 71, nor the singleness of purpose in an attorney required by *Glasser vs. U. S.*, 315 U. S. 60, 75, 76. If, on the hearing of the order to show cause, the

facts alleged in the petition are established, the petition should be granted.

The petition alleges that the court continued the trial and that the jury brought in a verdict against petitioner and the three other defendants on all three counts of the indictment. The court, on September 17, 1930, sentenced Wright to an aggregate of ten years for the three offenses. On the same day, petitioner, having plead guilty to a charge of violation of the motor vehicle act, 18 USC 408, was sentenced to five years in the penitentiary. These two sentences [21] were to run consecutively but not to commence till the expiration of a sentence he was serving in Joliet Penitentiary.

Petitioner was arrested when he had served the imprisonment portion of his Illinois sentence, but while he was serving the period in which he was released under the Illinois law. He was imprisoned in Alcatraz Penitentiary. Three petitions for habeas corpus were denied, but a fourth, addressed to me, was granted on the ground that his federal sentences had not begun to run. In *re Wright*, 51 Fed. Sup. 639, a decision affirmed on appeal *Johnson vs. Wright*, 135 Fed. (2d) 914 (C.C.A. 9)—that is, that court considered and upheld a fourth petition after three had been denied.

Petitioner is thus seen to have served over three years in Alcatraz before his release from his wrongful imprisonment there—lost time to him for executive clemency well may be sought. The time consumed in the presentation of the three denied

petitions contributed largely to this illegal confinement.

On the expiration of his Illinois sentence, petitioner was again imprisoned in Alcatraz Penitentiary on June 25, 1944. The petition alleges that he is entitled to 133 days good time credits and that he was entitled to release from the imprisonment portion of his five year sentence on October 8, 1947. He was thus for the first time entitled to raise in habeas corpus the validity of the ten year sentence above discussed, for no court has power to determine the validity of a consecutive sentence where one is imprisoned on a valid sentence, *McNally vs. Hill*, 293 U. S. 131, a case followed by a succession of opinions of this court.

In *McDonald vs. Johnston*, 149 Fed. (2d) 768 (C.C.A. 9), [22] this circuit held at page 769: "The federal courts have no power in a habeas corpus proceeding, once it is shown that in any event the petitioner is presently held legally by his jailor, to determine such questions as the future termination of his sentence. *McNally vs. Hill*, 293 U. S. 131, 138 et seq., * * * *De Maurez vs. Squire*, 9 Cir., 121 Fed. (2d) 960, 962 and cases cited."

This holding was of May 21, 1945; yet less than a month later, on June 18, 1945, long before the five year sentence had expired, that court in a casual per curiam, with no finding on the facts of the conflicting interests of petitioner's attorney, held that petitioner's second and ten year sentence

had been after a trial in which he had been duly represented by counsel.

That *per curiam* refers to a decision of the United States District Court for the Northern District of California No. 23647-S, a decision rendered during petitioner's wrongful first detention. There the district court found that petitioner was legally serving his five year sentence of which the imprisonment portion had not expired. It made no finding of fact concerning the representation by the petitioner's attorney of the three defendants whose interests were so adverse to petitioner's. Without such finding and having found it had no power to act, the court proceeded to state as a conclusion of law "that petitioner was not denied the right of counsel at any time during the course of the proceedings before the trial court" on the trial resulting in the ten year sentence.

Other petitions filed in the district court were denied on the ground that the matter had been disposed of in case No. 23647-S, *supra*. [23]

Since all these decisions were rendered while the courts were without power to act, and since the decisions in 23647-S and all the cases were without finding on the essential question of the facts as to the dual representation at the trial, I am not impressed with their casual conclusions. I do not think it an abuse of the petition repeatedly to seek a finding stating the facts of the dual representation, the very essence of the case presented by the petitions. I regard it as within my power to con-

sider the petition to me "a power resting in the conscience of the judge, to be exercised in light of the circumstances of the particular case and on grounds which square with reason and justice." *Price vs. Johnston*, 161 Fed. (2d) 705, 708; *c.f.* *Hawk vs. Olson*, 326 U. S. 271, 66 S. Ct. 116, where the Supreme Court upheld Hawk's petition though it states at page 272 it had denied two petitions for certiorari on Hawk's two other habeas corpus proceedings in which the same ground was asserted, and *Cochran vs. Kansas*, 316 U. S. 255, where the Supreme Court sustained a petition after four petitions, two on the federal and two in the state courts, had been denied.

Petitioner on January 8, 1948, filed a petition in the District Court of the Northern District of California. An order to show cause was issued, but the district court made no finding on the issue tendered of the diverse interests of the attorney representing petitioner. Instead, it relied on the prior decisions in which no finding had been made on that issue.

Wright raised the question here presented, in his petition to me filed in 1942. I there studied the contention here advanced, but refused to pass on it. In *re Wright* 51, Fed. Sup. 639, 644. Because of my prior study and because of [24] the absence of any finding of the facts on the issue here tendered in any of the dispositions of his prior petitions, in the exercise of my discretion I am making an exception to the practice established in *Bowen vs. Johnston*, 55 Fed. Sup. 340;

It Is Hereby Ordered that James A. Johnston, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before me at 316 Post Office Building, San Francisco, on the 6th day of April, 1948, at the hour of 10 o'clock a.m. of that day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein, and that the Warden have with him Cecil L. Wright, there to present his case in propria persona.

Dated March 30, 1948.

WILLIAM DENMAN,
United States Circuit Judge.

[Endorsed]: Filed April 23, 1948. [25]

[Title of U. S. Court of Appeals and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now James A. Johnston, Warden of the United States Penitentiary, Alcatraz Island, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner," on whose behalf the petition for writ of habeas corpus is filed, is detained by the respondent, as Warden of the United States Penitentiary, Alcatraz Island, California, under and by virtue of the judgments and sentences of the District Court of the United States for the Eastern District of Illinois, hereinafter called the "trial Court," in the cases of United States of America vs. Tuck Wright, alias Cecil Wright, number 11,032, and the United States of America vs. Cecil Wright, number 11,074, and alias commitments issued in said cases on the 21st day of June, 1944, and telegraphic orders and directives issued at Washington, D. C., on June 17, 1944, and signed respectively by John Q. Cannon, Administrative Assistant to the Attorney General of the United States and James V. Bennett, Director of the Bureau of Prisons of the Department of Justice, ordering and directing the commitment of the petitioner to the United States Penitentiary at Alcatraz Island, California;

II.

That the only issue cognizable in habeas corpus raised by the petitioner, to wit, the alleged denial of the effective assistance of counsel, is similar to that raised and [26] claimed by him in four of his prior petitions, being case number 23647-S Adm., wherein the Court denied the petitioner's discharge by writ of habeas corpus and made findings of fact and conclusions of law adverse to petitioner, and

case number 23546-R, wherein the Court dismissed the petition for writ of habeas corpus on the ground that the facts therein alleged were insufficient on their face to justify the discharge of petitioner, and which judgment of the Court dismissing the petition for writ of habeas corpus in case number 23546-R was affirmed by the Circuit Court of Appeals for the Ninth Circuit, case number 10971 on June 18, 1945 (149 F. (2d) 648, certiorari denied 326 U. S. 786); case number 25110-R, wherein the Court denied the petition for writ of habeas corpus on the ground that the said petition when reviewed in the light of the action taken by the Court in six other prior petitions for writ of habeas corpus showed that the facts therein alleged were insufficient on their face to justify the discharge of the petitioner; and case number 27833-H, wherein the Court on February 27, 1948, denied the petition for writ of habeas corpus on the ground that the issues raised therein had been decided adversely to petitioner in previous actions before the Court and cited the following cases: *Wright vs. Johnston*, Nos. 23,518-S, 23,611-S, 26,647-S (Admiralty); 23,744 (Denman; 51 F. Supp. 639, affirmed 137 F. (2d) 914; 23,793-G (Admiralty), 49 F. Supp. 748; 23,472 (Denman); 23518-G; 23546-R, affirmed 149 F. (2d) 648; 25,110-R; 25,599 (Denman); 25,638 (Denman); 25,779 (Denman) and 27,185-H);

III.

That the entire record of the proceedings in habeas corpus, number 23647-S Adm., the entire

record in habeas corpus case number 23546-R, the entire record of proceedings in habeas corpus case number 25110-R and the entire record of the proceedings in habeas corpus case number 27833-H, heretofore instituted by the petitioner, are hereby referred to and incorporated herein as part of this Return, as though fully set forth herein.

IV.

That the respondent is informed and believes that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial Court and that the petitioner was in fact effectively represented by counsel at the time of his conviction and sentence.

Wherefore respondent prays that the petition for writ of habeas corpus filed herein be denied and the order to show cause, heretofore issued herein, be discharged.

Dated April 6, 1948.

/s/ FRANK J. HENNESSY, JK
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States
Attorney,
Attorneys for Respondent.

[Endorsed]: Filed April 23, 1948. [28]

PLAINTIFF'S EXHIBIT "B"

(Admitted April 9, 1948)

In the District Court of the United States of
America for the Eastern District of Illinois

Criminal No. 11032

UNITED STATES OF AMERICA

vs.

TUCK WRIGHT, alias CECIL WRIGHT

COMMITMENT

Now on this 21st day of June, A.D. 1944, came William W. Hart, United States Attorney and Ray M. Foreman, Assistant United States Attorney and present the petition of the United States of America for an alias commitment against the Defendant Tuck Wright alias Cecil Wright in the above entitled cause and the Court having considered said petition and the records and files in this cause finds:

1. That the allegations contained in said petition are true and correct;

2. That the Defendant Tuck Wright, alias Cecil Wright was heretofore and upon September 17, 1930, convicted of a violation of Sections 88, 315 and 317, of Title 18 of the United States Code and sentenced to five, three and two years in the United States Penitentiary on Counts One, Two and Three respectively of the indictment filed in this cause, said sentence to run and be served consecutively and that said Defendant pay a fine of \$10,000 to

the United States; that the service of said sentence begin upon the expiration of the sentence which said Defendant was then serving in the Southern Illinois Penitentiary;

3. That thereafter and on or about November 1st, 1939 said Defendant was released from the Southern Illinois Penitentiary in the State of Illinois, delivered to the United States Marshal for the Eastern District of Illinois and thereafter delivered by [30] said United States Marshal to the United States Penitentiary at Leavenworth, Kansas, from which institution he was subsequently transferred to the United States Penitentiary at Alcatraz, in the State of California;

4. That on or about October 22, 1943, said Defendant was released from said United States Penitentiary at Alcatraz, California by order of the United States Circuit Court of Appeals for the Ninth Circuit, said Court holding in the order granting said release of said Defendant from said institution that said Defendant had not yet begun the service of the sentence heretofore imposed by this Court, which said sentence could begin only after the expiration of the sentence imposed upon him by the Courts in the State of Illinois and subsequent to his discharge from parole by the State of Illinois;

5. That on or about June 16, 1944 the Defendant Tuck Wright, alias Cecil Wright was discharged from the custody of the State of Illinois by the duly authorized officials of the State of Illinois and is now subject to commitment to the custody

of the Attorney General pursuant to the judgment and sentence originally imposed upon him by this Court.

It Is therefore, Ordered and Adjudged by the Court that the Defendant having been found guilty of the violation of Sections 88, 315, and 317 of Title 18 of the United States Code, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five years on Count One of the indictment herein, three years on the Second Count and Two years on the Third Count of said indictment, said sentences to run and be served consecutively and that he pay a fine of \$10,000 to the United States and that said Defendant be further imprisoned until payment of said fine or until said Defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this commitment to the United States Marshal or other qualified officer and that the same shall serve as a commitment herein. [31]

Attest a true copy.

(Court Seal)

/s/ WALTER C. LINDLEY,
United States District Judge.

/s/ D. H. REED,
Clerk.

(copied from reverse side)

Alcatraz, California

June 26, 1944

Pursuant to Telegraphic instructions from John Q. Cannon, Administrative Assistant to the Attorney General, dated June 17, 1944, I took into my custody the body of Cecil "Tuck" Wright at Hammond, Ind., on date of June 21, 1944, and committed said Cecil "Tuck" Wright, to the Vermillion County Jail at Danville, Illinois on June 21, 1944.

In compliance with instructions from James V. Bennett, Director of Bureau of Prisons, Dept. of Justice, dated June 17, 1944, on authority of Attorney General, I committed the body of said Cecil "Tuck" Wright to the U. S. Penitentiary, Alcatraz, California on June 25, 1944.

CARL J. WERNER,

U. S. Marshal, Eastern District
of Illinois.

By /s/ **CARL J. WERNER,**

U. S. Marshal, June 25, 1944.

A true copy.

By

Record Clerk, USP, Alcatraz

June 25, 1944 [32]

In the District Court of the United States of
America for the Eastern District of Illinois

Criminal No. 11074

UNITED STATES OF AMERICA

vs.

TUCK WRIGHT, alias CECIL WRIGHT
COMMITMENT

Now on this 2nd day of June A.D. 1944, came William W. Hart, United States Attorney and Ray M. Foreman, Assistant United States Attorney and present the petition of the United States of America for an alias commitment against the Defendant Tuck Wright alias Cecil Wright in the above entitled cause and the Court having considered said petition and the records and filed in this cause finds:

1. That the allegations contained in said petition are true and correct;

2. That the Defendant Tuck Wright, alias Cecil Wright was heretofore and upon September 17, 1930, convicted of a violation of Section 408, of Title 18 of the United States Code by plea of guilty entered by him to the indictment in this cause, and sentenced to five years in the United States Penitentiary, said sentence to run and be served consecutively to sentence imposed upon him in case No. 11032 in this Court; that the service of said sentence begin upon the expiration of the sentence which said Defendant was then serving in the Southern Illinois Penitentiary;

3. That thereafter and on or about November

1st, 1939 said Defendant was released from the Southern Illinois Penitentiary in the State of Illinois, delivered to the United States Marshal for the Eastern District of Illinois and thereafter delivered by said United States Marshal to the United States Penitentiary at [33] Leavenworth, Kansas, from which institution he was subsequently transferred to the United States Penitentiary at Alcatraz, in the State of California;

4. That on or about October 22, 1943, said Defendant was released from said United States Penitentiary at Alcatraz, California by order of the United States Circuit Court of Appeals for the Ninth Circuit, said Court holding in the order granting said release of said Defendant from said institution that said Defendant had not yet begun the service of the sentence heretofore imposed by this Court, which said sentence could begin after the expiration of the sentence imposed upon him by the Courts in the State of Illinois, and subsequent to his discharge from parole by the state of Illinois;

5. That on or about June 16th, 1944 the Defendant Tuck Wright, alias Cecil Wright was discharged from the custody of the State of Illinois by the duly authorized officials of the State of Illinois and is now subject to commitment to the custody of the Attorney General pursuant to the judgment and sentence originally imposed upon him by this Court.

It is therefore, Ordered and Adjudged by the Court that the Defendant having been found guilty

of the violation of Section 408, Title 18 of the United States Code, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five years, said sentence to run and be served consecutively to the sentence imposed upon him in Case No. 11032 of this Court.

It is further Ordered that the Clerk deliver a certified copy of this commitment to the United States Marshal or other qualified officer and that the same shall serve as a commitment herein.

(Court Seal)

WALTER C. LINDLEY,
United States District Judge.

Attest a true copy.

/s/ D. H. REED,
Clerk. [34]

(Copied from reverse side)

In compliance with instructions from James V. Bennett, Director of Bureau of Prisons, Dept. of Justice, dated June 17, 1944, on authority of Attorney General, I committed the body of said Cecil "Tuck" Wright to the U. S. Penitentiary, Alcatraz, California on June 25, 1944.

By /s/ CARL J. WERNER,
U. S. Marshal, East. Dist.
of Illinois, June 25, 1944.

A true copy.

By

Record Clerk, U.S.P. Alcatraz, June 25, 1944.

(Copy) (Two Telegrams)

Western Union

XVC153 41 Govt-Wux Washington DC 17 53 1P
Rapid Werner United States Marshal-
Danville, Ill 1944 June 17 PM 4 47

You Are Authorized And Directed To Proceed
Hammond Indiana To Take Custody Of Cecil
Wright Under Judgement From Your Court Is-
sued September 17 1930 And Commit Wright To
Alzatrax As Directed By Prisons Bureau Take
Certified Copy of Judgment With You—

JOHN Q. CANNON,

Administrative Assistant to the
17 1930 Attorney General

(No. 2)

Western Union

C166 13 Govt-CP Washington DC 17 547P
Carl J. Werner U S Marshall
1944 June 17 PM 5 26

Commit Cecil Wright To Alcatraz As Soon As
Possible After Taken Into Custody—

JAMES V. BANNETT.

Copied from Original Telegrams:

By /s/ C. W. SUNDSTROM,

Record Clerk, USP, Alcatraz,
Calif. August 4, 1944. [36]

RECORD OF COURT COMMITMENT

Department of Justice
Penal and Correctional Institution
United States Penitentiary
Alcatraz, California

First Name: Cecil Wright. No. 579-AZ.

Alias: "Tuck" Wright.

Color: White. Birth Date: 9-6-07. Age: 36.

True Name: Cecil L. Wright.

Name and number of prior commitments to Fed.
Inst.: (55980—Leav. Same offense).

Offense: P. O. Violations—B. & E., Theft and
Conspiracy and Dyer Act.

District: E-D-Illinois-Danville.

Sentence: 15 Years (2-5 yrs, 1-3 yrs. & 1-2 yrs.,
Consecutive). Fine \$10,000. Committed: Yes.

Sentenced: Sept. 17, 1930.

Committed to Fed. Inst.: June 25, 1944—Alcatraz.

Sentence begins: June 21, 1944.

Eligible for parole: June 20, 1949.

Eligible for conditional release with good time:
July 16, 1954.

When arrested: Sept. 12, 1930.

Where arrested: State Pen., Menard, Ill.

Residence: Hammond, Indiana.

Time in jail before trial: Since arrest.

Rate per mo. good time: 10. Total good time pos-
sible: 1800 Days.

Expires full term: June 20, 1959.

Former Com. on Sentence to Other Institutions:
No. 9492 & 15386, State Penitentiary, Menard, Il-

Illinois; No. 6485, State Penitentiary, Joliet, Illinois; No. 5751-A, State Reformatory, Pontiac, Illinois. (See Note-reverse side of sheet.)

Person to be notified in case of serious illness or death: Mrs. Exa Wagner, Sister (relation to prisoner), 2713 162 Place (Address), Hammond, Indiana.

A True Copy.

By C. W. SUNDSTROM,
Record Clerk, USP, Alcatraz,
Calif. [37]

(Note on reverse side of sheet:)

Originally, Wright was taken into custody to begin service of 15 year sentence (instant offense) on October 31, 1939, which date he was released from the Illinois State Penitentiary on parole. Original dates as shown on record of court commitment, were, as follows:

Sentenced: Sept. 17, 1930.

Committed (Leav.): Nov. 1, 1939 (as No. 55980-L)

Sentence Begins: Oct. 31, 1939.

Eligible for parole: Oct. 30, 1944.

Eligible for conditional release with good time: Nov. 25, 1949. With extra good time: Oct. 30, 1949 (credit of 26 days ind. g. t.)

Forfeited good time: Oct. 17, 1941: 30 days industrial good time.

Full Time Expiration: Oct. 30, 1954.

Received in transfer from U.S.P., Leavenworth, at Alcatraz: 7-23-41.

On October 22, 1943, Wright was released from U.S.P., Alcatraz on Court Order, through action of

the 9th Circuit Court of Appeals, which had decided subject's sentence "had not yet begun to run", as he was still on parole by Illinois State Parole authorities. He was furnished transportation to Illinois and when he returned there, was placed on parole by the State authorities, and on or about June 16, 1944, he was discharged from said parole. Subsequently an alias commitment was issued by the U. S. District Court, Eastern District of Illinois, at Danville, on June 21 and June 22, 1944, and the U. S. Marshal of that District ordered to take Wright into custody for commitment to a Federal Penitentiary. He was taken into custody on June 21, 1944, and on June 25, 1944, committed to U. S. Penitentiary, Alcatraz, California.

On his original commitment, Wright served time from October 31, 1939 to October 22, 1943 a period of 3 years, 11 months and 22 days.

[Endorsed]: Filed April 23, 1948. [38]

[Title of U. S. Court of Appeals and Cause.]

ORDER

To the Clerk of the United States District Court of
the United States for the Northern District of
California:

It appearing from the petition for the writ of habeas corpus, the order to show cause why the writ should not issue, the return to the order and the traverse thereof by the petition accepted as

traverse by the respondent, that due cause exists for the issuance of the writ to the respondent warden, the Clerk of the United States District Court is ordered forthwith to issue the writ of habeas corpus addressed to the respondent warden, ordering the warden to produce the body of the petitioner before me at my chambers, No. 316 Post Office Building, San Francisco, at the hour of ten-thirty o'clock a.m. on Friday, April 9, 1948.

WILLIAM DENMAN,
United States Circuit Judge.

[Endorsed]: Filed April 6, 1948. [39]

United States District Court, Southern Division,
Northern District of California

HABEAS CORPUS

The President of the United States of America
To James A. Johnston, Warden, United States Pen-
itentiary, Alcatraz, California

Greeting: You are hereby commanded, that the body of Cecil L. Wright by you restrained of his liberty, as it is said detained by whatsoever names the said Cecil L. Wright may be detained, together with the day and cause of his being taken and detained, you have before the Honorable William Denman, United States Circuit Judge in and for the Ninth Circuit in his Chambers, room No. 316 Post Office Building in the City of San Francisco

at 10:30 o'clock a.m., on the 9th day of April, 1948, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable

WILLIAM DENMAN,
United States Circuit Judge.

at San Francisco, California, this 6th day of April,
A.D. 1948.

C. W. CALBREATH,
Clerk.

[Endorsed]: Filed April 6, 1948. [40]

[Title of Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

Comes now James A. Johnston, Warden of the United States Penitentiary, Alcatraz Island, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner", on whose behalf the petition for writ of habeas corpus is filed, is detained by the respondent, as Warden of the United States Penitentiary, Alcatraz Island, California, under and by virtue

of the judgments and sentences of the District Court of the United States for the Eastern District of Illinois, hereinafter called the "trial court", in the cases of the United States of America vs. Tuck Wright, alias Cecil Wright number 11,032, and the United States of America vs. Cecil Wright, number 11,074, and alias commitments issued in said cases on the 21st day of June, 1944, and telegraphic orders and directives issued at Washington, D. C., on June 17, 1944, and signed respectively by John Q. Cannon, Administrative Assistant to the Attorney General of the United States and James V. Bennett, Director of the Bureau of Prisons of the Department of Justice, ordering and directing the commitment of the petitioner to the United States Penitentiary at Alcatraz Island, California;

II.

That the trial Court had jurisdiction over petitioner and the offenses alleged in the indictments returned against him in said criminal causes numbered 11032 and 11074;

III.

That respondent is informed and believes, and further [41] alleges, that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial Court and that the petitioner was in fact represented by counsel at the time of his conviction and sentence;

IV.

That the return to order to show cause, hereto-

fore filed herein, is hereby referred to and incorporated herein as though set forth in full.

Wherefore respondent prays that the petition for writ of habeas corpus be denied and that the writ of habeas corpus, heretofore issued, be discharged.

Dated April 9, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,

[Endorsed] Filed April 23, 1948. [42]

Ninth Judicial Circuit of the United States
Before William Denman, Circuit Judge of the
Ninth Circuit.

No. 28026

CECIL L. WRIGHT,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, OPINION, AND ORDER FOR
RELEASE**

Wright has presented to me as circuit judge a petition for a writ of habeas corpus, alleging that he is in the custody of the above Warden, who is holding him under a commitment issued by the Dis-

trict Court of the United States for the Eastern District of Illinois on a judgment sentencing him for an aggregate of ten years of successive sentences and a fine of 10,000, for stealing \$2.43 from a postoffice in Strasburg, Illinois, breaking and entering the postoffice and conspiracy with three other accused, tried with him, to commit the above offenses.

The petition alleges, and the Warden agrees, that a five year sentence imposed by the same court the same day as the above sentences and included in the commitment has been served as to its imprisonment period.*

The petition alleges that the ten year sentences were given after a trial set and had one day after his arraignment; that the court at arraignment appointed an attorney for both Wright and the three other accused; that the three [43] others had given statements to the government officials accusing Wright of committing the crimes on which the trial so was set; that Wright's defense was an alibi to be proved by two witnesses whose names and addresses he gave the court in an affidavit on the morning of the trial and that the court denied a motion for a continuance to secure them, though he had had an attorney, so embarrassed, for less than a day to secure them; that Wright's attorney, so representing clients with such conflicting inter-

* This sentence succeeded Wright's service of a sentence in Joliet Penitentiary, Illinois.

ests, moved for a segregation of Wright for a separate trial, which motion the court denied.

The petition further claims that Wright's trial, in which he was represented by an attorney so embarrassed, was with a denial of the right of effective assistance of counsel given him by the sixth amendment to the Constitution, and that the trial one day after arraignment and one day after he first had any assistance of counsel, and then such counsel, is a denial of the due process of law in violation of the fifth amendment.

An order to show cause was issued, issue joined and it was held that the petition stated a cause for the issuance of the writ. The writ was issued and served, return made setting forth the above commitment, the petition stipulated to be a traverse of the return, and hearing had.

At the hearing, it appeared from the record and authorities cited that Wright has made motions in the District Court of the United States for the Eastern District of Illinois respecting the judgment of conviction, long after the term of court in which it was entered. The parties agree that the facts are that these proceedings were not in the nature of *coram nobis*, and I so find. It was also there [44] agreed that if the ten year sentences were invalid, Wright's petition for release should be granted.

Wright there stated he desired no counsel and would conduct his case *propria persona*. The Warden was represented by Assistant United States Attorney Joseph Karesh. Stipulated evidence was

introduced and the case argued and submitted. Upon this evidence I make the following

FINDINGS OF FACT

Prior to the time of his arraignment, Wright, without counsel, had been confined in Joliet Penitentiary, Illinois, on a sentence for a state offense. On the 16th of September, 1930, he was taken to the United States District Court in Danville, Illinois, and arraigned with the three other defendants.

The judge there presiding deposes that Wright (a) had no attorney, and (b) had no funds to hire one, and (c) that he had no means of securing one, and I further so find.

None of the other three accused had counsel, and the court appointed an attorney then in the court room, one J. D. Allen, stipulated now to be deceased, to serve in that capacity for all of them. That judge deposes that he "directed the United States Attorney to give Mr. Allen full access to all of the file, disclosing all evidence against the defendants, and the United States Attorney complied with the request."

Though neither Wright nor any of the three had had counsel theretofore, the court nevertheless set the case for trial for September 17, the next day after arraignment.

Allen left the court, went to the office of the United States attorney and there discovered that each of three of [45] his clients had given statements in writing, each (a) charging Wright with the crimes for which he was to be tried the next

day and also (b) confessing their own participancy in the crimes.

The unfortunate Allen, a reputable colored practitioner, thus found himself within a few hours of a trial with three clients accusing Wright, a fourth client, and the likelihood that his duty to Wright could oblige him to tell the jury that: "You must disregard the statements of my other three clients accusing Wright of the crime. These are statements of dishonest men—scoundrels who have sought to charge an innocent man with participating in a crime which they alone committed. You cannot believe men of such character." At the same time, Mr. Allen might well be compelled to argue on behalf of the three that: "You must acquit these men because they are innocent, honorable, law-abiding men who could not possibly have done any of the violent and criminal things with which they are charged. They have pleaded not guilty, and you must believe them."

In the few remaining hours for the preparation of the several defenses of the four men, no reputable member of the legal profession could proceed with the case without the frustrating knowledge he was violating its primary canon—detachment of interest. Conscientious counsel, as Allen is shown to be, so profoundly embarrassed, was not qualified to give efficient representation to any of his clients.

To add to Attorney Allen's confusion and perturbation of mind, he learned from Wright that his defense was an alibi to be established by two witnesses whose names and [46] addresses in Decatur,

Illinois, he was given. All this appeared on a statement given by Wright to the investigating officers and in the possession of the prosecuting attorney when Wright was arraigned. Allen thus had to prepare the cases of three of his clients on the three serious crimes charged and to seek to make some overnight contact with Wright's alibi witnesses at the addresses given. Decatur, the town of their residence, is 73 miles from Danville, the place of the trial.

In this situation, Allen waited till the next morning when the trial began, when he made a motion for a continuance as to Wright to have an opportunity to seek his witnesses for his only and, if true, his sufficient defense. For this motion he had prepared an affidavit signed by Wright setting forth the facts.*

* "Tuck Wright, one of the above named defendant, makes oath and says that he cannot safely proceed to trial of this cause at the present term of this court on account of the absence of one Glen Rommel and one Mary Rommel both of whom are material witnesses for the defendant in said cause, and whose residence is 713 South Oakland Court, Decatur, Illinois. That this affiant expects to prove by said witnesses, Glen Rommel, and Mary Rommel, the following matters, all of which are material to the issues involved in said cause: to-wit: That this affiant was not in Strasburg, Illinois, on the 9th day of April, 1930, when the post office of the United States at said place was burglarized; that this affiant was severely injured and was in the City of Decatur under the care of one Dr. McGill, and was not at or near the scene of the supposed crime; that all the matters and things which the defendant ex-

.

The court denied this motion for a continuance. On this, the presiding judge later deposed: "The motion for [47] continuance was denied because I thought that no legal ground for continuance existed. The affidavit disclosed that defendant was evidently aware of the indictment against him as he said that he had attempted to write to two witnesses, but that the authorities at the State Penitentiary did not let his letters go out, but he did not show that from the time he acquired knowledge of the indictment up until the time of the trial, he made any other effort or attempt to get in contact with witnesses or arrange for their presence, or subpoena them. He consulted no lawyer; he wrote no lawyer. He did not write the Judge of the United States Attorney, but waited until the time

pects to prove by the said Glen Rommel and Mary Rommel are true.

"* * * This affiant further says that he is informed and believes that the issues involved in this cause *was* be controverted, and that the evidence relating to such issues will be highly conflicting, as introduced by the respective parties, and that he knows of no other person or persons than the said Glen Rommel and Mary Rommel by whom he can so fully prove the above matters set forth, and this affiant further says that he expects to and believes that he will be able to procure the attendance and testimony of the said Glen Rommel and Mary Rommel at the next term of this Court.

"And this affiant further says that the said Glen Rommel and Mary Rommel are not absent by the procurement, connivance or consent of this affiant, either directly or indirectly, and that this application is not made for delay, but that justice may be done. (Signed) Cecil Wright Affiant."

of his trial, and then made an application for continuance. I believed he had not shown due diligence. If I erred, it was because I believed that fact."

With the case not at issue till arraignment, Wright could not know before arraignment the date the trial would be set. It was not till arraignment that the federal trial judge could perform his obligation to advise Wright of his right to counsel to prepare his defense.

To meet the situation of the conflict of interest between his three other clients and Wright, Attorney Allen moved for a severance as to Wright, Wright's affidavit having stated: "This affiant further says that he is informed and believes that the issues involved in this cause will be controverted, and that the evidence relating to such issues will be highly conflicting, as introduced by the respective parties." This the court denied, the judge later deposing that: "As to the motion for severance, I thought that inasmuch as these defendants had been indicted together, as co-defendants, inasmuch as they were charged with conspiracy jointly, the Government should not be put to the expense of more than one trial before one jury. I believed that I could adequately protect the rights of each defendant by my charge to the jury, and this I attempted to do, and, in my discretion, therefore I denied the motion." (Emphasis supplied.) [48]

Attorney Allen made no further motion to relieve himself of his dual and conflicting representation, and on September 17 the trial was commenced.

At the trial, what had appeared in the affidavit for severance was further confirmed. The prosecution introduced the statements of Allen's three other clients accusing Wright of the three crimes and also confessing their own guilt. Also was introduced Wright's statement showing his claim of alibi and the names and addresses of his witnesses. The two witnesses to prove the alibi were not procured and the prejudicial inference necessarily arose in the jurors' minds that his failure to produce such clearly exculpatory testimony meant there was no such testimony.

As to the statements of the three co-defendants charging Wright with the crimes and also confessing their own participancy therein, the judge deposes that he charged the jury that "no confession was binding on any person other than the one who made it, and that it was not to be considered as evidence against any other defendant," and I further find that he so charged the jury.

There was evidence other than the statements sufficient for a verdict of guilty against Wright.

The jury's verdict of the guilt of Wright and of the three other defendants was rendered that day, and immediately thereupon Wright was given the sentences here in question.

CONCLUSIONS OF LAW

From the above findings of fact as to the conflicting interest represented by Attorney Allen, I conclude that Wright was denied the right to the efficient assistance of counsel given him by the sixth

amendment, and that with a counsel so embarrassed, compelling him to undertake the conflicting defenses in less than 24 hours, and in the same time [49] to seek and procure Wright's witnesses, is a denial to Wright of the due process of law, to which he is entitled under the fifth amendment.

OPINION

The proof of Wright's claims of alibi by the named witnesses at the given, or even later discovered addresses if they had moved, would be a complete defense to the crimes charged against him. Obviously, counsel Allen, representing the conflicting interests of his three other clients, was totally incapable in the few hours before the following morning of the trial to search for and procure their presence, and at the same time prepare the defense of his other clients.

The trial judge decided that Wright had forfeited his right to time to have counsel singly devoted to his interest to procure his witnesses, and that he **must go to trial** the next day without such witnesses. The reasons he gives constitute a grossly unjust judicial absurdity. Joliet Penitentiary, in which Wright was confined until he was arraigned, is about 100 miles from the district court at Danville. The judge's subsequent deposition states that Wright had no counsel, had no "funds" to procure one and no "means" to procure one. He then states as his reason why Wright, before arraignment, that is, before the case was at issue and when he could not possibly have known the date of

trial, had forfeited his right to secure witnesses with the aid of counsel, that "The affidavit disclosed that defendant was evidently aware of the indictment against him as he said that he had attempted to write to two witnesses but that the authorities at the State Penitentiary did not let his letters go out, but he did not show that from the time he acquired knowledge of the indictment up until the time of the trial, he made any other effort or [50] attempt to get in contact with witnesses or arrange for their presence, or subpoena them. He consulted no lawyer; he wrote no lawyer. He did not write the Judge or the United States Attorney, but waited until the time of his trial, and then made an application for continuance. I believed he had not shown due diligence. If I erred, it was because I believed that fact."

It is an injustice for the court to find Wright without counsel and without money or means to procure one and then give as one of the reasons for the forfeiture of his due process right to procure witnesses that "He consulted no lawyer; he wrote no lawyer."

It is a further injustice to assume from Wright's affidavit as a further fact for forfeiting his right to secure his witnesses that he "did not write the United States Attorney" concerning his alibi. The fact is that the prosecuting attorney had Wright's signed statement stating the alibi defense and the names and addresses of his witnesses, a fact disclosed to the judge at the beginning of the trial.

The only ground left to justify the forfeiture of Wright's right to have his witnesses found and produced is that he did not write to the judge about it, that is, from a prison which the judge states prevented him from writing directly to the witnesses who, he claimed, would establish his innocence. The petitioner in *Johnson vs. Zerbst*, 304 U.S. 458, 461, also in prison, did not communicate with the trial judge, yet his petition was granted.

In this situation, I hold that Wright, a layman, did not forfeit his right to a counsel singly devoted to his defense, with sufficient time after the case became at issue [51] by arraignment to procure his witnesses. In this I am following the decision of the tenth circuit in *Wallick vs. Hudspeth*, 128 Fed. (2d) 343 (CCA-10), a habeas corpus proceeding where the prisoner was granted the writ and returned for a new trial on facts essentially like those here.

In *Hawk vs. Olson*, 326 U.S. 271, a habeas corpus proceeding, the writ was held to be sustainable where it be shown "that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the impaneling of the jury." (Emphasis supplied.) *Id.* p. 278. There counsel was appointed on the day of trial and no continuance granted. It is no distinction that here the professionally hamstrung Allen was appointed the day before, with the witnesses he was to procure in a town 73 miles away and he required, at

the same time, to prepare the defense of the three others.

The trial judge contends that his conduct, if wrongful, is mere error. Of course, Allen could have appealed, but so Hawk's attorney could have appealed but did not. Nevertheless, the Hawk case holds such claimed fundamental error denying constitutional rights may be adjudicated in a habeas corpus proceeding.

In the habeas corpus proceeding of *Johnson vs. Zerbst*, 304 U.S. 458, the court held that as soon as the accused is deprived of counsel, the court loses jurisdiction to proceed with the case, stating: "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment [52] stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus."

Citing the Zerbst case, the Supreme Court in *Glasser vs. United States*, 315 U.S. 60, states at page 70: "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama*, 287 U.S. 45, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

In that case, *Glasser*, an attorney, indicted, as was *Wright*, for conspiracy, had another attorney to represent [53] him. The court appointed that attorney to represent a co-conspirator having an interest opposed to *Glasser's*. As with *Wright*, *Glasser* did not himself object. There was not, as here, a motion to segregate *Glasser's* trial. In that situation, the court at page 71 stated: "The court made no effort to reascertain *Glasser's* attitude or wishes. Under these circumstances, to hold that *Glasser* freely, albeit tacitly, acquiesced in the appointment of *Stewart* is to do violence to reality and to condone a dangerous laxity on the part of the

trial court in the discharge of its duty to preserve the fundamental rights of an accused." (Emphasis supplied.)

Concerning the effect in a conspiracy trial of appointing one attorney for two persons of diverse interests, the court's condemnation states, at page 75:

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart (Glasser's attorney) as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder v. Massachusetts*, 291 U.S. 97, 116; *Tumey v. Ohio*, 273 U.S. 510, 535; *Patton v. United States*, 281 U.S. 276, 292. And see *McCandless v. United States*, 298 U.S. 342, 347. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of

his counsel without the court's becoming a party to encumbering that assistance. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. [54] We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser."

No divergence of interest more clearly could have been "brought home to the court" than did the inculpatory statements of Attorney Allen's three other clients. At the moment of their introduction in evidence, Allen becomes disqualified as Wright's attorney and he, in effect, had none. Then if not before, the court lost jurisdiction to proceed as stated in *Johnson vs. Zerbst*, *supra*. The trial judge's statement that he "thought that * * * inasmuch as they were charged with conspiracy jointly, the government should not be put to the expense of more than one trial before one jury" (emphasis supplied), in defiance of the Glasser case, is typical of the court's attitude. "Expense" is no factor in determining the accused's right of counsel.

So, also, is the statement that he "could adequately protect the rights of each defendant by my charge to the jury." No charge to the jury could

relieve Attorney Allen of his embarrassment when he learned a few hours before trial of his conflicting professional duties and the impossibility, before the next morning, of obtaining the witnesses to testify to Wright's alibi. This is even assuming that the court had instructed the jury clearly, not only that the confession portions of the three statements were to be disregarded, but also the statements implicating Wright.

It is my opinion that the court lost jurisdiction to proceed on the denial of the motion for a continuance. If it had not lost jurisdiction then, it was lost as soon as the conflicting statements were introduced into evidence and it became apparent that either the motion for a severance should be [55] granted, or that a separate attorney should be appointed for Wright with a continuance adequate for such separate attorney to prepare his case.

FURTHER FINDINGS OF FACT

I further find that after June 21, 1947, when Wright had served the imprisonment portion of a sentence of five years to Alcatraz Penitentiary, on January 8, 1948, Wright filed with the United States District Court of the Northern District of California, in case No. 27833-H, the same petition as here filed. That court denied the petition and discharged an order to show cause, not on the merits of the petition. Instead it stated: "Petition for Writ of Habeas Corpus having been briefed and submitted for decision, and it being noted by the

court that the issues raised by the petition have been decided adversely to petitioner in previous actions before this court.”*

I further find that prior thereto Wright filed in the district court of the Northern District of California two other petitions, that is, both filed prior to his service of the above five year sentence, when the court had no power to consider them.

In the first of these, case No. 23,647-S, on a similar petition filed on March 28, 1942, that court found that the imprisonment portion of the above five year sentence had not been served. Then, having found itself without jurisdiction to adjudicate the validity of the instant sentence, on the same facts as here presented that court purported to make findings relative to its validity. In them is no finding on [56] the ultimate fact of the diverse interest represented by Attorney Allen, and no finding of probative facts remotely suggesting the presence of this issue. Nevertheless, the court stated as a “conclusion of law” that “petitioner was not denied the right of assistance of counsel at any time during the course of the proceedings, and was there duly represented by counsel.”

Succeeding this, the same petition was filed in Case 23456-R on September 18, 1944. It showed on its face the pendency of the above five year

* That is to say, though none of the courts had the power to determine the issue of the validity of the ten year sentence, the doctrine of *res judicata* by their decisions was applied in this habeas corpus proceeding.

sentence. Relief was denied on the ground that facts alleged in the petition "are insufficient on their face to justify the discharge of the petitioner." That case was appealed and decided on June 18, 1944. Within a month prior thereto, that circuit court decided the case of McDonald vs. Johnson, 149 Fed. (2d) (CCa-9) 768, in which it held at page 769, concerning its power to adjudicate non-validity of a sentence where another is being served: "The federal courts have no power in a habeas corpus proceeding, once it is shown that in any event the petitioner is presently held legally by his jailor, to determine such questions as the future termination of his sentence. *McNally v. Hill*, 293 U.S. 131, 138 et seq., * * * *De Maurez v. Squire*, 9 Cir., 121 Fed. (2d) 960, 962, and cases cited."

Though without power to determine the merits of Wright's two contentions respecting his ten year sentence, that court, in a casual per curiam of a single paragraph based upon the decision in the first case 23647, affirmed the district court. *Wright vs. Johnston*, 149 Fed. (2d) 648. The opinion does not mention the issue of the conflicting [57] interests of Allen's clients nor the single day in which Allen was to prepare the defenses of his three other clients and procure the witnesses to prove Wright's alibi.

I further find that it is not true that nine petitions presenting these issues have been filed. There are but three, the one since the imprisonment portion of the five year sentence was served and the two

others above stated, decided without power to consider such issues. Wright filed other petitions, but they concern entirely different issues.

FURTHER CONCLUSIONS OF LAW

From these findings concerning these three cases, I conclude that Wright has never been tried in this circuit in a manner legally considering or disposing of his contentions that he has been denied the efficient assistance of counsel or given any time after arraignment to prepare his defense. In this connection it should be noted that in *Hawk vs. Olson*, 326 U.S., at page 272, Hawk had applied for and been refused the writ, three times by the federal courts and at least once by a state court.

The unfortunate result here arises from the overburdening of my brethren within reach of Alcatraz Penitentiary by the flood of petitions without merit and often perjured. It is only because of the exceptional circumstances here shown and my prior familiarity with his contentions prematurely made In re Wright 51 Fed Sup 639, 633, that I have made an exception to the practice stated in my opinion in *Bowen vs. Johnson*, 55 Fed Sup 340, and entertained Wright's petition. [58]

ORDER

It is ordered that Wright's petition is granted and that the Warden deliver Wright to the United States District Court for the Eastern District of Illinois for appropriate proceedings therein. It is further ordered that such delivery shall be delayed

for ten days. If the Warden shall not appeal within that time, the Warden shall forthwith so deliver Wright to that court.

WILLIAM DENMAN,
United States Circuit Judge
for the Ninth Circuit.

[Endorsed]: Filed April 23, 1948. [59]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice is hereby given that James A. Johnston, Warden, of the United States Penitentiary, Alcatraz, California, the respondent in the above-entitled proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order and opinion of the Honorable William Denman, United States Circuit Judge for the Ninth Judicial Circuit, discharging the petitioner, made and entered in the above-entitled action, on April 23, 1948.

Dated April 23, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,
/s/ JOSEPH KARESH,
Assistant United States
Attorney,
Attorneys for Respondent.

[Endorsed]: Filed April 23, 1948. [60]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the respondent-appellant herein may have to and including the 22nd day of July, 1948, to file the record on appeal herein in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated June 1st, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed June 1, 1948. [61]

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75(a)

The undersigned designates the following to be contained in the record on appeal:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Return to Order to Show Cause.
4. Respondent's Exhibit "B."
5. Order for Issuance of Writ of Habeas Corpus.
6. Writ of Habeas Corpus.
7. Return to Writ of Habeas Corpus.

8. Findings of Fact, Conclusions of Law, Opinion and Order for Release.

9. Reporter's Transcript of April 9, 1948, and all Stipulations, Exhibits, Documents and Transcripts therein mentioned.

10. Notice of Appeal. [62]

11. Order Extending Time to Docket, filed June 1, 1948.

12. Order Extending Time to Docket, filed July 16, 1948.

13. This Designation of Contents of Record on Appeal, under Rule 75(a).

14. Clerk's Certificate.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States
Attorney,
Attorneys for Respondent-
Appellant.

[Endorsed]: Filed July 19, 1948. [63]

In the District Court of the United States for
the Northern District of California, Southern
Division.

Before Hon. William Denman, Judge.

No. 28026

CECIL WRIGHT,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden United States
Penitentiary, Alcatraz, California,

Respondent.

Friday, April 9, 1948

2:00 o'clock p.m.

Appearances: In Personam: Cecil Wright. For
Respondent: Joseph Karesh, Esq., Assistant U. S.
Attorney.

Mr. Karesh: For the record herein it should be
noted that the petitioner has not requested counsel,
nor does he desire to have counsel appointed to
represent him in these habeas corpus proceedings.

It is stipulated that there may be read into the
record the contents of a telegram from the United
States Attorney for the Eastern District of Illinois
to the United States Attorney for the Northern
District of California, dated April 8, 1948

“Re Cecil Wright Alcatraz Defendant’s At-
torney J. D. Allen Dead”

It is stipulated by and between the parties that

if the ten year sentence imposed by the trial courts in Criminal Cause No. 11,032 is void, the petitioner is now entitled to [64] his release from the custody of the respondent inasmuch as with good time credits now accrued, he has served the imprisonment portion of the five-year sentence imposed against him in Criminal Cause No. 11,074.

It is stipulated that the signature of the respondent to the return to the writ of habeas filed on his behalf is hereby waived and the signatures of the attorneys for the respondent, Frank J. Hennessy, United States Attorney for the Northern District of California, and Joseph Karesh, Assistant United States Attorney for the Northern District of California, are sufficient.

It is stipulated that the petition for writ of habeas corpus is hereby deemed the traverse to the return to the writ of habeas corpus.

It is stipulated that there may be received in evidence as Respondent's Exhibit B herein the following document so marked.

It is stipulated that this case may be submitted without any further testimony being offered or documents offered on the stipulations on file herein, on the pleadings on file herein, Exhibit B above-mentioned, and the evidence and exhibits received in the case of Cecil Wright vs. James A. Johnston, in the District Court of the United States for the Northern District of California, in case No. 23,-647-S, consisting of the following:

Transcript of testimony before Judge A. F. St.

Sure, under date of June 27, 1942, and May 29, 1942, and filed with that court on November 16, 1942.

Deposition of the trial judge, Walter C. Lindley, with attached exhibits, taken on July 23, 1942, in Vermillion County, Illinois.

Deposition of Harold Baker taken on July 29, 1942, at East St. Louis, Illinois.

Documents referred to as Respondent's Exhibit A in [65] proceedings 23,647 as aforesaid.

It should be noted that with the exception of the transcript of testimony above mentioned the documents above-referred to, received in evidence in case 23647-A as aforesaid, are to be found not only in the record of case 23647-S on file with the clerk of the said courts, but also in the printed transcripts of record in the case entitled, "James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellant, vs. Cecil Wright, Appellee, C.C.A. 9, No. 10,331, at pages 234 through 307.

It should be further noted that an affidavit filed by petitioner with the trial court on September 17, 1930, and found in the transcript of testimony in the habeas corpus proceedings No. 23,647 as aforesaid, is likewise found in the transcript of the record in the case of Johnston vs. Wright, C.C.A. 9, No. 10,331, *supra*, at pages 110 through 112.

It is stipulated that none of the colloquy between counsel and between the Court and counsel and the oral arguments made by the parties on April 6,

1948, the date on which the petitioner appeared in response to an order to show cause, and on April 9, 1948, the date the petitioner was brought before the court in response to writ of habeas corpus heretofore issued, need be transcribed.

It is further stipulated that the matter may be deemed submitted without any written memorandum being filed by either of the parties herein, it being noted that the court made a list of the authorities cited by the parties during the course of the oral argument.

Those stipulations are correct and what I have read is correct, Mr. Wright?

Mr. Wright: That is agreeable, yes.

Mr. Karesh: The case is now submitted, your Honor.

The Court: Submitted.

Mr. Karesh: And the petitioner is remanded to the custody [66] of the respondent?

The Court: Yes.

CERTIFICATE OF REPORTER

J. L. Sweeney, Official Reporter, certify that the foregoing four pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

J. L. SWEENEY.

[Endorsed]: Filed April 23, 1948. [67]

In the Southern Division of the United States District Court, in and for the Northern District of California.

Before Hon. A. F. St. Sure, Judge.

No. 23647-S

CECIL WRIGHT,

Petitioner.

vs.

JAMES A. JOHNSTON, Warden United States Penitentiary, Alcatraz, California,

Respondent.

Friday, May 29, 1942

Counsel appearing: For Petitioner: Cecil Wright, in Propria Personam. For Respondent: A. J. Zirpoli, Esq., Ass't U. S. Att'y.

The Court: Proceed.

Mr. Zirpoli: Respondent respectfully asks leave to file return to the writ heretofore issued, and copy has been given to the Petitioner.

Respondent is ready, and the Petitioner is here.

The Court: You are Mr. Wright?

Mr. Wright: Yes, sir.

The Court: You are appearing on your own behalf?

Mr. Wright: Yes, sir.

The Court: Do you wish an attorney to represent you?

Mr. Wright: Yes, I would like to have an at-

torney to represent me in only a part of the petition, your Honor. In respect to the making of an application for a writ of habeas corpus, as set forth, I was denied counsel at the trial. Depositions should be taken, and I would like to have an attorney appointed by this Court for the purpose of taking those depositions. That applies to Point 1 of my application; but in no way would it alter Points 2 and 3 of my application.

The Court: I would not like to ask an attorney to represent you only in part of your case. You just stated that you would [68] like to have the assistance of some attorney, but some portions of the case you wish to conduct, yourself.

Mr. Wright: I have three points in my writ of habeas corpus.

The Court: What is the first point?

Mr. Wright: That I was denied counsel.

The Court: Do you feel you are capable to present this matter to the Court without the assistance of an attorney?

Mr. Wright: On points 2 and 3, yes.

The Court: Why do you need an attorney for Point 1?

Mr. Wright: For the reason that I believe that before the Court determines whether I was denied effective assistance of counsel, it will be necessary to take depositions in the case.

The Court: Have you any money with which to employ an attorney?

Mr. Wright: No, sir.

The Court: I see Mr. O'Connor in court. He has kindly aided many men in situations like yours. I don't know whether he would be willing to give you some assistance or not.

Mr. O'Connor: I am quite willing to proceed, but I don't know what the situation is here.

The Court: On the first point he mentions, perhaps you could assist him in that. You may proceed, then, Mr. Wright.

Mr. Wright: Your Honor, on September 17, 1930, I was sentenced by the United States District Court for the Eastern District of Illinois to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of fifteen years.

The Court: With what were you charged?

Mr. Wright: I was charged with burglary, larceny, and conspiracy on one indictment, and National Motor Vehicle Theft Act, in the second indictment.

The Court: Did you have a trial?

Mr. Wright: Yes.

The Court: That is, you had a trial before a jury?

Mr. Wright: Yes.

The Court: You were represented by counsel?

Mr. Wright: The Court appointed a counsel over my objections. My objections were that it would be impossible for one [69] attorney to defend five defendants on trial, because of conflicting interests between myself and the other co-defendants; That counsel would not be able to cross-ex-

amine the witnesses without hurting or doing harm to one of the other defendants on trial.

The Court: The statement you now make is addressed to the first point?

Mr. Wright: To the first point, yes.

The Court: As to that first point, you think it probably will be necessary to take some depositions in the East to support the charges you have made, is that right?

Mr. Wright: It wouldn't be necessary for depositions unless the court or respondent would be willing to concede petitioner the point. I have certified copies of the records of the court, also, and I believe the Respondent has them, too. It clearly shows in the judgment that this one counsel was appointed to represent five men on trial.

The Court: All charged with the same offense?

Mr. Wright: Well, no.

The Court: Have you a copy of the indictment filed with your petition?

Mr. Wright: It is attached with Exhibit A to my writ of habeas corpus.

The court forced the appointment of a colored attorney. I didn't want a colored attorney to represent me in the trial.

The Court: Did you state your objections to the Court?

Mr. Wright: I did, in an affidavit for continuance.

The Court: Filed at the time, or before the time of trial?

Mr. Wright: Yes, prior to the trial.

The Court: Have you a copy of the affidavit attached to your petition?

Mr. Wright: No, sir; I couldn't obtain an affidavit from the trial court. I wrote the trial court and asked the trial court to furnish me with certified copies of the affidavits for continuance and for separate trial; and they wrote and told me there were no records to that effect. But, I believe, in the judgment of the court it states I made a motion for continuance, and motion for continuance was by affidavit, not just [70] an oral motion. In that I stated I wanted ten days to correspond with my mother and obtain money to employ a lawyer of my own choice. That affidavit was denied; the motion for continuance was denied in court on September 17, 1930.

There was nothing I could do about it. I was in the custody of the Marshal, and I had to proceed to trial, and I believe that is an infringement of my constitutional right, to force me to trial without a continuance, when the continuance was also for the purpose of obtaining witnesses in my favor. The prosecution had three months to prepare for trial, and I never had any such time.

The Court: Didn't you have the same time as the Government?

Mr. Wright: No, I was incarcerated in the penitentiary in Southern Illinois at the time. The Eastern District of Illinois assumed jurisdiction over my person first, and the Marshal of the Eastern

District, without consent of the Court, loaned me to the State Sheriff for the purpose of the trial.

The Court: In the State Court?

Mr. Wright: In the State Court.

The Court: Were you tried in the State Court?

Mr. Wright: I was tried in the State Court, and he had exclusive custody and control over me at all times.

The Court: The Sheriff?

Mr. Wright: The United States Marshal.

The Court: The United States Marshal. Were you convicted in the State Court?

Mr. Wright: I was convicted in the State Court and sentenced to not less than one year and no more than my natural life.

The Court: Did you serve that time?

Mr. Wright: No, 52 days only; and the Marshal came and asked the Warden of the State Prison to release me to his custody for trial in the Federal court.

The Court: That was done? At any rate, you were taken back by the Marshal to the District Court, and this trial took place that you have described. [71]

Mr. Wright: Yes.

The Court: Who was the judge? What was the Judge's name?

Mr. Wright: Judge Walter C. Lindley. At the time he imposed sentence on me he was not familiar with the fact that I was serving an indeterminate sentence in the Illinois State Penitentiary.

The Court: I don't think, Mr. Wright, that would make any difference. You were within the jurisdiction of the United States Court.

Mr. Wright: But is it possible, your Honor, that a Marshal can loan a prisoner for the purpose of doing time?

The Court: Of course, we will probably ascertain the facts later on, but I don't know how it came about that the Marshal was able to secure you from the State at this time,—

Mr. Wright: Not to interrupt, your Honor, but the Marshal first arrested me pursuant to a bench warrant after indictment. The United States Marshal apprehended me first. There were no State indictments existing at that time.

The Court: The United States Marshal arrested you first. You were then arrested by the State authorities, tried in the State Court, sent to the State Prison. The Marshal went to the State prison and obtained custody and took you to the United States District Court.

Mr. Wright: The Marshal of the Eastern District of Illinois was commanded to deliver me as soon as possible to the United States Penitentiary at Leavenworth, Kansas.

The Court: You were tried in the United States Court, and you went to prison on the sentences imposed by the United States Court?

Mr. Wright: That is right.

The Court: And you have never finished your State Prison term?

Mr. Wright: No, I was paroled.

The Court: You were paroled?

Mr. Wright: Yes; but when one sovereignty takes jurisdiction, that means—

The Court: I doubt very much if the United States Court [72] would worry about that, as long as they had custody and control of you. Perhaps the State may have wrongfully surrendered jurisdiction to the United States Court; but when the United States Court once got jurisdiction in the case I don't think it would make any difference what happened in regard to the sentence imposed upon you in the State Court, nor would it make any difference how the marshal got you.

Mr. Wright: I would say no, it wouldn't make any difference how they got me, but it would make some difference when my sentence started.

The Court: What do you mean, "It would make some difference when sentence started"?

Mr. Wright: After I left the Court, the Clerk of the Court entered provisions that my Federal sentence would start on the expiration of my State sentence. Now, your Honor, the term didn't expire; I was paroled.

The Court: What was the sentence of the Court?

Mr. Wright: The sentence of the Federal Court?

The Court: Yes.

Mr. Wright: Imprisonment in the United States Penitentiary at Leavenworth, Kansas, for a period of five years on the first count, for a period of three years on the second count, and for a period of two

years on the third count, from the time of delivery to the said Penitentiary. The sentences would run consecutively; and I was fined \$10,000.

The Court: All right. How long did you serve in the State Prison?

Mr. Wright: Nine years, one month, and thirteen days.

The Court: After you served your sentence in the State Penitentiary, you were then returned to the custody of the United States Marshal and put in the Federal Penitentiary. How long have you been in the Federal Prison?

Mr. Wright: Since October 31, 1939.

The Court: How long have you been in Alcatraz?

Mr. Wright: About ten months.

The Court: Have you made application before for writ of habeas corpus? [73]

Mr. Wright: I made two prior applications for writ of habeas corpus, but on prior applications I never set forth lack of effective assistance of counsel.

The Court: Do you have any attorney in Illinois?

Mr. Wright: No, sir; only what I know myself, and that is not too much.

The Court: Is there anything further you wish to say to me about this first point?

Mr. Wright: I believe I better have depositions taken of the trial court to show that the trial court refused the right of effective assistance of counsel. I believe that right was denied me by the trial court.

The Court: Whose deposition do you want to take?

Mr. Wright: I wish to take the deposition of the Judge of the United States District Court.

The Court: Judge Lindley?

Mr. Wright: I would like to make one more statement: In 1935 while I was under incarceration in the State Prison, I wrote to Judge Walter C. Lindley and asked him what steps and what proceedings I could take to set aside conviction in the Federal Court, and Judge Lindley wrote back and stated that he had no power or no authority to give me any legal advice. He also stated in there he lost jurisdiction of the Court after my sentence had begun.

The Court: In the State Penitentiary?

Mr. Wright: He was under the impression my sentence was running at the time. Of course, this has all been called to Judge Lindley's attention, and after I was received at the United States Penitentiary at Leavenworth, Kansas, he wrote a letter, as I previously stated, and advised that he had no jurisdiction over the case after my sentence began to run. I think those records, if produced in court by deposition, would show exactly the same thing.

The Court: Mr. Zirpoli, we are on this first point.

Mr. Zirpoli: Your Honor, I will send for certain records. I want to determine what the testimony would be, because the Government might want to take depositions, too. He makes the contention

that something was added subsequently, and I want to [74] get the record to see when that appeared.

The Court: Judge Lindley is a very good lawyer.

Mr. Wright: Judge Lindley is a very good judge, and I would like to talk to him, but I am 2000 miles away from him. I believe if my case had been reopened, the trial court—

The Court: In what city were you tried?

Mr. Wright: In Danville, Illinois.

The Court: That is Judge Lindley's home town. Was the offense committed in Danville?

Mr. Wright: No, in the Eastern District of Illinois.

The Court: As to this first part, Mr. O'Connor, you heard what has been said here by Mr. Wright, Mr. Zirpoli, and the Court?

Mr. O'Connor: Yes, your Honor.

The Court: Would you aid this defendant in ascertaining the facts?

Mr. O'Connor: Yes, your Honor, I suggest that Mr. Zirpoli could have the depositions of the Judge and the Clerk taken.

Mr. Zirpoli: I might possibly desire to take the deposition of the United States Attorney, or anyone else.

The Court: Yes. As to the other points you have here, are you willing to submit them on briefs? There is not any testimony that needs to be taken, as far as the other points are concerned?

Mr. Wright: Not as far as the other points are concerned. I think now I will let Mr. O'Connor

prepare the whole case, but I would like to have Points 1, 2, and 3 argued.

The Court: He can do that orally, or by briefs—either one.

Mr. Wright: That would be for him to consider; that is after the depositions are taken in Illinois and the following hearings had here.

The Court: Yes.

Mr. O'Connor: May I make a suggestion that the matter go over four weeks?

Mr. Zirpoli: Yes, that is all right.

Mr. O'Connor: In the meantime, I will go over to Alcatraz [75] and talk to the prisoner.

Mr. Zirpoli: The Petitioner has spoken to the Court primarily in the discussion of Point No. 1.

The Court: Yes.

Mr. Zirpoli: I want to know if he wants that entered in the record in support of his petition.

The Court: If it is necessary after the depositions are taken, if Mr. O'Connor thinks it is necessary, Mr. Wright will be brought back here to give testimony under oath.

Mr. O'Connor: I think that will be necessary, because of the fact that there is no evidence in the record to sustain his contention.

The Court: I suppose you can arrange, Mr. Zirpoli, with Mr. O'Connor as to what depositions you wish to take. There may be others than those that have been mentioned here.

Mr. Zirpoli: I wanted to ascertain just what the facts are, myself. I want to make another comment.

I understand there is a contention made that you were denied the use of process for securing witnesses on your own behalf.

Mr. Wright: Yes.

Mr. Zirpoli: Was there any objection made to the claims for continuance on your behalf?

Mr. Wright: Yes.

Mr. Zirpoli: And there was a direct objection to the Court, itself, as to counsel appointed for you?

Mr. Wright: Yes.

Mr. O'Connor: I understand that he claims he was brought into court and asked for continuance on the ground he wanted to secure counsel, of his own choosing.

The Court: Is it fully understood now?

Mr. O'Connor: Yes, your Honor.

The Court: This matter will go over, then until June 26th.

[Endorsed]: Filed Nov. 16, 1942. [76]

[Title of District Court and Cause.]

Saturday, June 27, 1942, 11:00 o'clock a.m.

Before Hon. A. F. St. Sure, Judge.

Appearances: For Petitioner: James B. O'Conner, Esq., Cecil Wright, In propria person. For Respondent: Thomas C. Lynch, Esq., Ass't U. S. Att'y.

The Clerk: Wright v. Johnston.

Mr. O'Conner: May it please your Honor, in this matter the petitioner has filed a motion that I be relieved as his counsel. At this time I ask that motion be granted.

The Court: What is the reason for requesting that Mr. O'Connor be removed?

Mr. Wright: Your Honor, petitioner would like to present his own case for the reason that taking depositions further in Illinois will cause a considerable delay, maybe two or three months, and I have no objection to Respondent taking depositions and a delay of thirty days, maybe, for the Respondent to take the depositions, but I feel I know my case; I would like to present it, myself.

The Court: You feel you are able to present your case without the assistance of Mr. O'Connor?

Mr. Wright: Yes.

The Court: Is that the reason you are asking—

Mr. Wright: Yes.

The Court: To be permitted to conduct your own case? [77]

Mr. Wright: Yes.

Mr. O'Conner: So far as I know from my conversations with the Petitioner, I don't think there is any objection to me, personally. Is that true, Mr. Wright?

Mr. Wright: No, there is no objection to Mr. O'Conner, personally. I would like to present my own case.

The Court: You don't wish me to appoint anyone else in his place?

Mr. Wright: No.

The Court: Very well, Mr. O'Conner, you may withdraw.

Mr. O'Conner: Thank you, your Honor.

Mr. Lynch: The situation appears to be this,

your Honor, a reading of the last pleading which has been filed by the petitioner, here, apparently has three points, one having to do with his good time, which, of course, may be submitted to the Court on the record of the Petitioner, and all questions of double jeopardy, which will be a question of law, can be submitted on the record, and then a point which has become a new point now by reason of the decision in the Glasser case, that because of the counsel being appointed, I believe, to represent other defendants—is that correct?

Mr. Wright: Yes.

Mr. Lynch: That he, therefore, was deprived of his right to have counsel of his own choice. That is a new point that will become a very important one, and he also makes the point that because a colored attorney was appointed to represent him and he objected to that, or he now objects to it. I don't know whether we can assume that, but there is that main point of fact, the question of whether the appointment of counsel to represent other defendants, that becomes an important issue for this Court to decide, because this Glasser case, which has recently been decided by the Supreme Court, is an extremely important decision. I don't know whether your Honor is thoroughly familiar—

The Court: Yes, I have read it.

Mr. Lynch: I would state the state of the record now was, the petitioner has previously indicated that he desires the deposition of Judge Lindley, and, of course, his action since then in saying he

does not want any depositions, and discharging Mr. O'Conner—

The Court: I presume the Government would wish to take depositions.

Mr. Lynch: We will take any depositions that are indicated, [78] your Honor, by the record.

The Court: Well, is there anything to be presented today?

Mr. Wright: Please, your Honor, I would like to move the Court to be sworn under oath to testify, and verify the reasons in the application for writ of habeas corpus.

The Court: Haven't you testified in this case before?

Mr. Wright: No, your Honor.

The Court: Let the Petitioner be sworn.

CECIL WRIGHT

The Petitioner: Sworn.

The Court: You may be seated right there, Mr. Wright, and testify from there if you don't object to doing that.

Mr. Wright: That is quite all right.

The Court: I merely stated that for your convenience. If you wish to take the stand you may do so, but if you are willing to testify from where you are seated—

A. That's quite all right.

The Court: Yes. Very well. Did you wish to make a statement?

Mr. Wright: Well, I would like to know if it

(Testimony of Cecil Wright.)

is permissible from the stand if I refer to my application.

The Court: Yes.

Mr. Wright: In making my testimony.

The Court: Yes, go right ahead.

Mr. Wright: Petitioner was denied his constitutional right to separate counsel, and his allegations all set forth that he was denied the separate assistance of counsel.

The Court: Well, isn't that completely covered by your petition?

Mr. Wright: Well, no, your Honor, not completely.

The Court: Well, what is it you wish to testify to in that regard?

Mr. Wright: Well, the petitioner did move the trial court by an affidavit for the right to be represented by counsel of his own choosing.

The Court: Did you file the affidavit before Judge Lindley?

Mr. Wright: Yes, your Honor. I filed the affidavit before the trial commenced.

The Court: Is a copy of that attached to your petition here? [79]

Mr. Wright: No, your Honor. I wrote the trial court for this affidavit, and they stated that the affidavit was not for my benefit but it was a record of the court, but that I wouldn't be permitted to use the affidavit for any reason asserting the judge denied the right to independent counsel of my own

(Testimony of Cecil Wright.)

choice. This was all after the decision of the Glasser case, and I was denied the right to any court record.

The Court: Do you wish a copy of that affidavit?

Mr. Wright: Yes, your Honor. I would say on this point that I moved the trial court for the undivided assistance of counsel.

The Court: Yes. Mr. Lynch, I think the petitioner ought to be furnished with a copy of that affidavit.

Mr. Lynch: I will see that he gets it, your Honor. I will write for it immediately, and I will submit him a copy of it properly certified. I will ask that he be furnished with certified copies.

The Court: Yes, a certified copy of the affidavit, any affidavit that he filed respecting the employment of an attorney to represent him in the case.

Mr. Lynch: Yes, your Honor. I will obtain that and see that he gets a properly certified copy.

Mr. Wright: Your Honor, the petitioner would like, during the period of time taken by Mr. Lynch for the purpose of taking his affidavits for the Respondent, petitioner would like during that time, as to points 2 and 3, to submit to this Court argument by petitioner, not orally, but by writing, and to have ten days to submit his brief, and Mr. Lynch have ten days to make his reply.

The Court: Well, you would wish to do that after you receive a copy of this affidavit?

Mr. Wright: Well, I don't believe that would have any bearing on points 2 and 3.

(Testimony of Cecil Wright.)

Mr. Lynch: That is correct.

The Court: Well, points 2 and 3, you are referring to points in your petition?

Mr. Wright: Yes, your Honor.

The Court: How are they designated? Are they designated under the Title "Argument"? You have a copy of this petition.

Mr. Wright: Yes, I have a copy of the petition.

The Court: On what page of your petition are you referring to? [80]

Mr. Wright: Page 5 of the application.

The Court: You say Point 1—where is Point 1?

Mr. Wright: Point 1 starts on page 1 to page 5.

The Court: Your point is as to—

Mr. Wright: To point out there was no effective assistance of counsel.

The Court: Point 2 what is that?

Mr. Wright: Point 2—

The Court: Those points are contained in the remaining portions of your petition?

Mr. Wright: Just the facts. There is law citations of authorities.

The Court: Yes, now, as to those two points, you are asking for ten days to file a brief supporting your petition?

Mr. Wright: Yes, your Honor.

The Court: And you would wish ten days to reply?

Mr. Lynch: Yes, your Honor. I understand the petitioner's points here in the supplemental

(Testimony of Cecil Wright.)

affidavit, as I stated before, his first and third points are matters of law which can be submitted on the record without the necessity of taking testimony.

The Court: Is there anything further at this time?

Mr. Wright: No, your Honor, I don't believe it would be necessary—I would like to mention I don't believe it would be necessary to produce my body back in this court after this affidavit—

The Court: Produce what?

Mr. Wright: Produce me back in this court.

The Court: Well, if it is we will let you know.

Mr. Wright: Well, I appreciate there is a lot of inconvenience in bringing me from Alcatraz.

The Court: Yes, it is somewhat inconvenient, undoubtedly, but if it would be necessary for you to be brought back—it may be that I would wish you to come back, and it may be that you would wish to give some testimony.

Mr. Wright: I appreciate that.

The Court: After you have read the affidavit, and you have learned what the depositions which will be taken by the Government contain.

Mr. Wright: Yes, your Honor. I merely mentioned that for the fact that I feel that all the testimony, or all the depositions to be taken [81] back in the trial court will be to my—will benefit my—

The Court: Your particular case. Well, that may be so. However, if you will want to take depositions—I should like to have the deposition particularly of Judge Lindley.

(Testimony of Cecil Wright.)

Mr. Lynch: Yes. I think that is the most important one, and the Assistant United States Attorney who was present at the trial.

The Court: Yes.

Mr. Lynch: And possibly the Clerk of the Court, and the Reporter, if any. We would have to ascertain the assistant attorney who was present at that time.

The Court: That is a fact, yes.

Mr. Lynch: I would like to ask the Petitioner if there is any deposition that he particularly desires to be incorporated in this record.

Mr. Wright: No, I don't believe there is. I would stand alone on your depositions.

Mr. Lynch: All right. Do you wish the opportunity to present interrogatories?

Mr. Wright: No. I believe the depositions you take—anything you do in the taking of depositions will be all right with me.

Mr. Lynch: Then it is entirely satisfactory to you that if we take these depositions you don't want to submit interrogatories or cross-questions?

Mr. Wright: No.

The Court: You don't wish any attorney to represent you?

Mr. Wright: No. I will stand alone on any record that will be found in the trial court, or deposition, and any testimony in the deposition.

Mr. Lynch: In saying that, Mr. Wright, you are cognizant of the fact that I intend to present

(Testimony of Cecil Wright.)

proof through depositions I am taking the statements that you have made, and your contentions are untrue, and obviously, because I am representing the Respondent, the purpose of my taking these depositions is to refute what you have said here.

Mr. Wright: I understand that.

Mr. Lynch: I don't understand, although you say you do, that they will be favorable to you, and so we will be clear about the depositions to be taken, you don't desire to submit any interrogatories?

Mr. Wright: No.

The Court: I am wondering if it would be proper under the circumstances [82] to have some person when these depositions are taken, to represent you. I feel quite sure that Judge Lindley would appoint some attorney to represent you.

Mr. Wright: Well, I believe he would—

The Court: Yes. I think he would appoint a reputable attorney there in Danville to sit in on the taking of the depositions, and see that your rights are protected.

Mr. Wright: I could easily waive that right. I feel that the records of the Court and Judge Lindley, himself, the United States Attorney, would not leave any doubt in what they say is true, and I don't believe they would lie about it.

The Court: I don't believe they would, either.

Mr. Wright: So I don't think it would be necessary to go to the trouble to question them.

The Court: I think it would be absolutely neces-

(Testimony of Cecil Wright.)

sary for me to have those depositions here before I pass upon your petition, unless—this is the last point, is it not?

Mr. Wright: The second point.

The Court: Unless you want to submit it on that report, but I think under the circumstances, I would want to take the depositions, of the people in Danville before the case is finally submitted.

Mr. Wright: Well, Mr. Lynch can have any time he wishes in addition to the original time you should allow.

Mr. Lynch: I will immediately write an airmail letter back to the United States Attorney asking him to set the depositions.

The Court: Please ask him to have them set—

Mr. Lynch: I think thirty days will be ample time, and I will have the depositions here.

The Court: What time, then, Clerk; sometime in August?

The Clerk: Yes, your Honor. Thirty days would be the latter part of July or the 1st of August.

The Court: Well, we want some time to receive those. I think you better put it on sometime in August.

The Clerk: August 3rd.

The Court: August 3rd.

Mr. Wright: Your Honor, may I state for Mr. Lynch's benefit that the United States Attorney that was in charge of the prosecution at my trial is not prosecuting attorney there now. [83] He is practicing law in East St. Louis, Illinois.

(Testimony of Cecil Wright.)

Mr. Lynch: Of course, there is another matter in regard to Judge Lindley; as your Honor knows, he leaves the Circuit quite a bit.

The Court: Well, he would probably be in Chicago or Danville.

Mr. Lynch: That is the United States Attorney, not the Assistant?

Mr. Wright: No; the United States Attorney.

The Court: Did the United States Attorney personally handle your case in court?

Mr. Wright: Yes, your Honor.

The Court: Was there any assistant present?

Mr. Wright: No.

Mr. Lynch: That was in Danville where you were tried?

Mr. Wright: That was in Danville.

Mr. Lynch: Before Judge Lindley?

Mr. Wright: Yes.

Mr. Lynch: Might I ask this, your Honor, for the purpose of saving time? How many defendants were there with you, Mr. Wright?

Mr. Wright: There were four others besides myself.

Mr. Lynch: Did you all have the same attorney?

Mr. Wright: The same attorney.

Mr. Lynch: One attorney?

Mr. Wright: One attorney.

Mr. Lynch: One attorney for four men?

Mr. Wright: Five men.

Mr. Lynch: And he was a colored attorney?

Mr. Wright: Colored attorney.

(Testimony of Cecil Wright.)

The Court: Do I understand you to say you objected in open court to this man acting as your attorney?

Mr. Wright: That is true. I objected when the trial was practically half over and resumed my objection when the trial was half over.

The Court: You made it before the trial?

Mr. Wright: I made it by affidavit before.

The Court: You then objected during the progress of the trial?

Mr. Wright: That is true. The United States Attorney refused a summary of the case for the Government on my part when Judge Lindley refused to give me undivided assistance of counsel.

Mr. Lynch: That suggests another question, your Honor, that we should obtain a transcript of the proceedings, because his objections would appear therein.

The Court: Yes.

Mr. Lynch: I will see that that is produced.

The Court: Very well. Now, is there anything further?

Mr. Lynch: Not by me, your Honor.

Mr. Wright: I believe that is it.

The Court: You consent to my continuing the matter until August 3rd?

Mr. Wright: I do your Honor.

The Court: And we will notify you if we think you should be here at that time.

Mr. Wright: Yes. May I ask for a copy of the

(Testimony of Cecil Wright.)

affidavit that Mr. Lynch gets be sent to Alcatraz for my reading, a copy of it?

The Court: Yes.

Mr. Lynch: You mean the affidavit of the court?

Mr. Wright: Yes.

Mr. Lynch: I will send you a certified copy, because you will want to attach it as a supplemental exhibit.

The Court: I think also when the deposition is returned the petitioner should have an opportunity to see it.

Mr. Lynch: Yes, your Honor. I will see the petitioner is furnished and is informed as to all actions that are taken, and that he has copies of all papers.

The Court: Very well. The case is continued until August 3rd.

[Endorsed]: Filed Nov. 16, 1942. [85]

CCA 9, No. 10331—No. 23,647-S

In the District Court of the United States of
America for the Eastern District of Illinois

September Term A.D. 1930

No.

THE UNITED STATES OF AMERICA

vs.

TUCK WRIGHT, ROBERT RAYMOND, CARL
SANDERS, MONTE CRIST, and JOSEPH
HARTMAN

PETITIONER'S AFFIDAVIT TO THE TRIAL
COURT MADE TWENTY-FOUR HOURS
AFTER SAID ARRAIGNMENT AND AP-
POINTMENT OF COUNSEL

Tuck Wright, one of the above named defendant,
makes oath and says that he cannot safely proceed
to trial of this cause at the present term of this
court on account of the absence of one Glen Rom-
mel and one Mary Rommel both of whom are ma-
terial witnesses for the defendant in said cause, and
whose residence is 713 South Oakland Court, De-
catur, Illinois. That this affiant expects to prove
by said witnesses, Glen Rommel, and Mary Rommel,
the following matters, all of which are material to
the issues involved in said cause: to-wit: That this

[86] affiant was not in Strasburg, Illinois, on the 9th day of April, 1930, when the Post Office of the United States at said place was burglarized; that this affiant was severely injured and was in the City of Decatur under the care of one Dr. McGill, and was not at or near the scene of the supposed crime; that all the matters and things which the defendant expects to prove by the said Glen Rommel and Mary Rommel, are true.

And this affiant further says that he tried to communicate with the said Glen Rommel and Mary Rommel by writing to them letters out of the Southern Illinois Penitentiary but was prevented from doing so by the rules of said institution which forbid inmates to write more frequently than one in two weeks. This affiant further says that he is informed and believes that the issues involved in this cause will be controverted, and that the evidence relating to such issues will be highly conflicting, as introduced by the respective parties, and that he knows of no other person or persons than the said Glen Rommel and Mary Rommel by whom he can so fully prove the above matters set forth, And this affiant further says that he expects to and believes that he will be able to procure the attendance and testimony of the said Glen Rommel and Mary Rommel at the next term of this Court.

And this affiant further says that the said Glen Rommel and Mary Rommel are not absent by the procurement, connivance or consent of this affiant,

either directly or indirectly, and that this application [87] is not made for delay, but that justice may be done.

/s/ CECIL WRIGHT,

Affiant.

Subscribed and sworn to before me this 17 day of September A.D. 1930.

/s/ D. H. REED,

Clerk of the United States District Court. [88]

No. 23,647-S and CCA 9, No. 10331

[Title of District Court and Cause.]

DEPOSITION OF WALTER C. LINDLEY

Deposition of Walter C. Lindley, of the County of Vermilion and State of Illinois, a witness of lawful age, produced, sworn and examined on his corporal oath, on the 23rd day of July A. D., 1942, at the office of the United States Attorney, Federal Building, Danville, Illinois, in pursuance of Notice of Taking Deposition, dated July 17, 1942, as a witness in a certain suit and matter in controversy now pending and undetermined in the said District Court in the Southern Division of the United States District Court, for the Northern District of California, wherein Cecil Wright, is Petitioner, and James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, is Respondent, case

No. 23647-S, on behalf of the Respondent herein, upon oral interrogatories. [89]

Appearances: For Respondent: United States District Attorney, for the Eastern District of Illinois. By: Ray Foreman, Esq., Asst. U. S. Attorney. For Defendant: (Petitioner). Petitioner not present and not represented by Counsel.

WALTER C. LINDLEY

being first duly sworn by me as a witness in said cause, previous to the commencement of his examination, to testify the truth, as well on the part of Petitioner as the Respondent, in relation to the matter in controversy herein, so far as he should be interrogated, testified and deposed as follows:

Direct Examination

Mr. Foreman:

Q. State your full name.

A. Walter C. Lindley.

Q. Where do you live?

A. Danville, Illinois.

Q. What was your occupation in the year 1930?

A. United States District Judge for the Eastern District of Illinois.

Q. Have you examined the records of the Clerk of the United States District Court for the Eastern District of Illinois in Criminal Case No. 11032?

A. I have. [90]

Q. Have you an independent recollection, Judge

(Deposition of Walter C. Lindley.)

Lindley, of the facts and circumstances which occurred at the trial of the defendants in that case?

A. I have.

Q. Do you recollect the appointment of the Attorney for the defendants in that case?

A. I do.

Q. What was his name? A. J. D. Allen.

Q. Will you describe Mr. Allen, in his capacity as a practicing attorney, Judge Lindley?

A. Mr. Allen was a regularly admitted, practicing lawyer, about fifty years of age, I should say. A student of the law, a competent, aggressive, reputable trial lawyer of a good many years experience, with a good knowledge of the law. He was a man of high character and stood for the highest ideals as a member of the colored race. He was one of the forces for the betterment of his race and a very creditable example of a competent trial lawyer.

Q. Had this attorney previously represented defendants in criminal cases in your Court?

A. He had, for a number of years, had considerable and extensive practice defending men charged with crime in my Court.

Q. Were objections made, by any of such defendants, either orally or in writing, relative to your appointment of Mr. Allen as attorney for said defendants, prior to your appointment of him as their attorney? A. No. [91]

Q. Were any such objections made by any of said defendants prior to the beginning of the trial

(Deposition of Walter C. Lindley.)

of said defendants in that case? A. No.

Q. Were any objections made by any of said defendants to his appointment or his representation of any of said defendants during the trial of said case? A. No.

Q. Were any objections taken by any of said defendants to said attorney's appointment or representation of them after the termination of said trial of said defendants?

A. Never, until I had Cecil Wright's petition in 1942.

Q. To what petition do you refer?

A. A petition I permitted him to file as a pauper in this Court, to vacate the judgment of conviction.

Q. Prior to the filing of said petition in this Court, had you received any written communications from the defendant, Tuck Wright, otherwise known as Cecil Wright, between the date of his conviction and the date of the filing of said petition in this Court? A. I had.

Q. Did defendant Tuck Wright, alias Cecil Wright, ever object or except to your appointment of Attorney J. D. Allen, as his representative in Case No. 11032, in any of said communications with you, prior to the filing of said petition to vacate?

A. No. I say that with this reservation. In the letters that I have in my file from him, I find no such objection at any time prior to the filing [92] of the petition in 1942, and my recollection is that at no time did he write to me complaining of the appointment of his Counsel or say anything about that matter before the petition of 1942.

(Deposition of Walter C. Lindley.)

Q. I call your attention to an exhibit, identified as Government's Exhibit No. 1-A. What is that, Judge Lindley?

A. That is a letter that purports to have been written on December 22, 1939 by Cecil Wright while he was confined in the penitentiary at Leavenworth, Kansas, to me.

Q. How did you receive it?

A. I received it through the United States Mail, in due course, and replied to it under date of December 26, 1939.

(Which said Government's Exhibit No. 1-A, is in words and figures following, to-it:)

GOVERNMENT'S EXHIBIT No. 1-A

December 22, 1939

From: Cecil Wright, L. B. P. M. B. No. 55,980.

To: Hon. Judge W. C. Lindley, Federal Court
Bldg., Danville, Illinois.

Honorable Sir:

I am writing you with reference to my case and wish to advise that I was sentenced by you September 17, 1930. I was at that time confined in the State Prison at Menard, Illinois.

My commitment there has a specification added and bracketed in, stating that my sentence starts [93] after the expiration of my state term. The bill of convoy also shows the same additional added sentence.

(Deposition of Walter C. Lindley.)

I wish to call to your attention some correspondence between you and I in the month of June 1935. I wrote you in regards to some advise concerning a Writ of Habeas Corpus in your Court. Your reply to me was, that you had lost jurisdiction in the case after the expiration of the term of Court in which I was convicted and especially after my sentence had begun. Your advice to me at that time, was to file application for a commutation of sentence.

At the time I was preparing my application forms, I had some "Photostatic" copies made and took the matter up with the late Senator James Hamilton Lewis. I also furnished him with a copy of the letter you wrote to me in June 1930. The late Senator Lewis took the matter up with: Mr. James A. Finch, United States Pardon attorney. Mr. Finch forwarded the necessary papers to me through the late Senator Lewis. I filled the forms out but they were destroyed by the prison authorities at Menard, Illinois. It appears to me that it would be necessary for a trial judge to consult the minutes of the court before advising me as to what procedure to take in the case.

Your Honor, I have been in prison almost ten years and I feel like I have served enough time for my wrong doings. I was young at that time and did not realize what I was getting into. I am not in any way connected or associated with the parties [94] here, that were sentenced on the same charge

(Deposition of Walter C. Lindley.)

that have almost completed their term at this institution.

The record of the court shows that these men made a confession and then retracted their written statement. All I ask of you is—to go over your records and furnish the Warden of this institution a similar copy of the letter you wrote to me in June 1935 with reference to my case and sentence.

It is not my desire to go into court for an adjustment of the case, although there is a number of technicalities in the case due to the United States Supreme Court ruling and also that of the Appeal Court, which makes the sentence illegal.

Any consideration shown me in regards to my own case will always be appreciated.

I am, obediently,

/s/ CECIL WRIGHT,

No. 55,980 P.M.B.

Leavenworth, Kansas.

Q. I now show you Government's Exhibit No. 1-B. Will you identify that, please?

A. This is a letter I received from Cecil Wright under date of April 2, 1942.

Q. How did you receive that letter?

A. Through the United States mail.

(Which said Government's Exhibit No. 1-B, is in words and figures following, to-wit:) [95]

(Deposition of Walter C. Lindley.)

GOVERNMENT'S EXHIBIT No. 1-B

From: Cecil Wright, 579 P.M.B.

Date: April 2-42 Apr. 3, 1942 R.R.B.

To: Hon. Walter C. Lindley, Fed. Dist. Ct., Danville, Ill.

Honorable Sir:

I have filed a Motion to Vacate Judgment and Sentence in case No. 11032, with the Clerk of the Court. This motion does not apply to the five year sentence in case No. 11074.

I have filed the motion in propria persona and no counsel will appear for me; and it is my desire to have the motion heard and determined from the contents therein.

I would like to state that after my conviction in case No. 11032, I have lived and abided by the rules and regulations of the various penitentiaries in which I have been continuously imprisoned under a judgment of convictions since September 17, 1930.

Of course your Honor may feel that my incarceration in Alcatraz has no doubt come about from some sort of disorder; but that is not true as my being in Alcatraz is only from the results of Habeas Corpus proceedings filed in the District of Kansas.

The case No. 11032 set forth in my motion is obviously unconstitutional and void; it is not only void for the reason that my constitutional rights

(Deposition of Walter C. Lindley.)

were denied, but the sentence is void by lapse of time.

It is not my desire to put the government to the [96] expense of a new trial, but I am entitled to a new trial and no doubt can obtain the same on appeal if the same is denied by Your Honor.

Thanking you in advance for your kind and careful consideration of this matter, I humbly express my appreciation to your Honorable Court, I am

Obediently,

/s/ CECIL WRIGHT.

No. 579 P.M.B.

Alcatraz, California.

Q. You have received other letters in addition to those identified by you as Government's Exhibits Nos. 1-A and 1-B?

A. Yes, sir. From time to time, over the years, Mr. Wright has written me. He wrote me shortly after his conviction, requesting a reduction of sentence and I advised him that I could not modify his sentence; that the term had expired; that his sentence had begun and that his recourse lay in application for executive clemency, or when he should become eligible, in an application for parole to the Parole Board. Some of these letters were long and they contained nothing other than is reflected in the two letters I have identified.

Q. Were any statements made by Tuck Wright,

(Deposition of Walter C. Lindley.)

alias Cecil Wright, in any of such additional letters, relative to your appointment of Counsel for him during the trial of this case? [97]

A. Never until his application of 1942. Referring to his letter of April 2, 1942, Government's Exhibit No. 1-B, Mr. Wright's attitude apparently, until this year, was disclosed by his letter of December 22, 1939, wherein he said he had been in prison almost ten years and felt he had served enough time for his wrongdoing. He said in that letter that he was young at the time and did not realize what he was getting into. This appears on the second page of his letter of December 22, 1939, Government's Exhibit 1-A, in the second paragraph.

Q. Did the defendant, Tuck Wright, alias Cecil Wright, at any time prior to or during the course of the trial of said case, request the appointment of an attorney other than Mr. Allen to represent him in said trial? A. No.

Q. Did the defendant, Tuck Wright, alias Cecil Wright, at any time prior to or during the course of the trial of said case, request the opportunity to employ separate counsel to represent him in said trial? A. No.

Q. Have you a recollection, Judge Lindley, of the events which occurred at the time of your appointment of Mr. Allen as Attorney for the several defendants in Case No. 11032? A. Yes, sir.

Q. Will you kindly state the events which occurred at that time?

(Deposition of Walter C. Lindley.)

A. When Wright was arraigned, he was advised [98] that he might plead guilty or not guilty. That, if he plead guilty, it would be the Court's duty to sentence him. If he plead not guilty, he would be entitled to a trial, either by jury or before the Court. In response to the arraignment and these suggestions from the Court, Wright entered a plea of not guilty. As presiding Judge, I then inquired of him as to whether he had Counsel, and advised him he was entitled to Counsel. He replied that he had not. I inquired as to whether he had funds with which to procure Counsel. He assured me he had none. I asked him if there were any means by which he could obtain Counsel. He assured me that there were not. I therefore appointed Mr. Allen, who happened to be in the Court Room, awaiting another matter, and I asked him if he would be willing to undertake to defend the defendants in the case. Mr. Allen graciously accepted the responsibility. No objection was made by any defendant. I directed the United States Attorney to give Mr. Allen full access to all of the file, disclosing all evidence against the defendants, and the United States Attorney complied with the request. When the case came on for hearing before the jury, the jury was selected in the ordinary manner and Mr. Allen defended throughout the trial, making such defense as he could under the facts presented, and appealed to the jury for an acquittal.

Q. Were any documents or pleadings of any na-

(Deposition of Walter C. Lindley.)

ture prepared by Mr. Allen, as Attorney for Tuck Wright, alias Cecil Wright? [99]

A. The only motion or pleading filed was an affidavit of Wright, asking for a continuance. I think a copy of it appears in the transcript.

Q. Were any oral motions made by this Attorney in behalf of defendant, Cecil Wright?

A. None other than the motion for a separate trial and such other motions as were made during the course of the trial by objections to testimony, or motions to strike, and a motion for an additional charge to the jury.

Q. Do you have any independent recollection of any such additional motion?

A. Yes, sir. My recollection is that Mr. Allen suggested that I had overlooked charging the jury as to the effect of the statements of the respective defendants. I thought I had fully explained that to the jury, but, upon his suggestion I again charged the jury, as he moved that I should, that no confession was binding upon any person other than the one who made it, and that it was not to be considered as evidence against any other defendant.

Q. Was there an official reporter employed in the United States District Court, for the Eastern District of Illinois, at the time of the trial of this case?

A. No, sir.

Q. Was a reporter available to take the testimony in cases in such Court, when especially employed to do so?

A. Yes, and even when defendants on trial re-

(Deposition of Walter C. Lindley.)

quested a court reporter and had no funds with which to hire him. [100]

Q. Was any request made by any of the defendants in Case No. 11032 for the reporting of the testimony in the case?

A. I am not certain but my best recollection is that there was and that Mr. Gannon took the evidence. I may be mistaken about this.

Q. Where is Mr. Gannon at the present time?

A. He died a number of years ago.

Q. Was the report of this testimony, if taken, ever transcribed?

A. Not that I ever heard of or knew.

Q. Was there ever any request made in this case for the transcription of said testimony, if such was taken?

A. Not until after Mr. Gannon had died, and then only by inference in that petition—the petition of 1942.

Q. In the trial of Case No. 11032, did the United States District Attorney, at any time during the trial of said case, request the Court to dismiss the indictment as against the defendant, Tuck Wright, alias Cecil Wright? A. No.

Q. Was any motion of any similar character made by the United States District Attorney, or any Assistant United States Attorney, during the trial of said case?

A. No, and I might add that I have always believed it to be the law that the United States At-

(Deposition of Walter C. Lindley.)

torney may nolle pross or dismiss an indictment, irrespective of the Court's desire; in other words upon [101] motion of the United States Attorney to nolle pross or dismiss an indictment, the Court must grant that motion, and that rule I have consistently followed. I am sure no such motion, or as Mr. Wright puts it in one of his letters to 'squash the indictment' was ever made.

Q. Can you tell us, Judge Lindley, why there was a denial of the motions for continuance and for severance by the defendant, Tuck Wright, alias Cecil Wright?

A. The motion for continuance was denied because I thought that no legal ground for continuance existed. The affidavit disclosed that defendant was evidently aware of the indictment against him as he said that he had attempted to write to two witnesses, but that the authorities at the State Penitentiary did not let his letters go out, but he did not show that from the time he acquired knowledge of the indictment up until the time of the trial, he made any other effort or attempt to get in contact with witnesses or arrange for their presence, or subpoena them. He consulted no lawyer; he wrote no lawyer. He did not write the Judge or the United States Attorney, but waited until the time of his trial, and then made an application for continuance. I believed he had not shown due diligence. If I erred, it was because I believed that fact.

(Deposition of Walter C. Lindley.)

As to the motion for severance, I thought that inasmuch as these defendants had been indicted together, [102] as co-defendants, inasmuch as they were charged with conspiracy jointly, the Government should not be put to the expense of more than one trial before one jury. I believed that I could adequately protect the rights of each defendant by my charge to the jury, and this I attempted to do, and, in my discretion, therefore I denied the motion. If you will permit me, I will have you incorporate in the record a copy of my letter to Mr. Wright under date of December 26, 1939, and that of January 22, 1940.

Mr. Foreman: Such documents may be identified as Government's Exhibits Nos. 1-C and 1-D, Exhibit 1-C being the letter of December 26, 1939, and Exhibit No. 1-D, the letter of January 22, 1940.

(Which said Government's Exhibits Nos. 1-C and 1-D, so marked for identification, and so identified, are in words and figures following, to-wit:)

GOVERNMENT'S EXHIBIT No. 1-C

Mr. Cecil Wright, No. 55980 P.M.B.
Leavenworth, Kansas.

Dear Sir:

I have your letter of December 22. As I have previously advised you, the jurisdiction of a trial judge over a case ends when sentence begins. He

(Deposition of Walter C. Lindley.)

has no more power of authority over your sentence than the man of the street. Your remedy, as I [103] previously advised you, lies in petition for parole or petition for commutation of sentence. Relief under each of these must be made by authorities other than the court.

I do not understand how it could be that prison authorities at Menard destroyed your papers, and I am sure that if you consult the warden at Leavenworth you will be furnished with authority to make proper application for parole or for executive clemency. On the former, the Parole Board acts and on the latter, the President through the Department of Justice acts, and obviously, each of these authorities is wholly outside the Court.

Yours very truly,

WCL:J

GOVERNMENT'S EXHIBIT No. 1-D

January 22, 1940

Mr. Cecil Wright,

No. 55,980 Box No. P.M.B.

Leavenworth, Kansas.

Dear Sir:

The law is, as I have previously said, that once a defendant has entered upon the service of his term, the trial court has no more jurisdiction over him than the man in the street. It is not necessarily

(Deposition of Walter C. Lindley.)

the expiration of the term at which the trial occurred that terminates the jurisdiction,—it is the commencement of the execution of the sentence. The [104] Supreme Court of the United States has many times so decided. The only exception to this rule occurs where the trial court suspends at least a part of the sentence for a definite period in the future and retains jurisdiction. As this did not occur in your case, my power is at an end and your remedy lies with the executive authorities for executive clemency or parole.

If you believe that your incarceration is wrongful under the constitution, you have a right to test it by habeas corpus proceedings in the United States Court where you are located, but you cannot proceed here.

Obviously, I cannot accede to your statement that you were deprived of your constitutional rights. Every defendant in this court is advised of the charge against him. He may plead guilty or not guilty. If he pleads not guilty and has no funds, a lawyer is assigned to defend him. If he has material witnesses whose presence he cannot secure, the United States statutes furnish him with relief through government advancement of funds to secure the witnesses.

Further communication to me will be of no avail

(Deposition of Walter C. Lindley.)

because, as I have assured you, there is nothing I can do for you.

Yours truly,

United States District Judge.

WCL:J [105]

A. I might add that I have read Mr. Wright's several petitions and letters, and that I never knew of the present objections until early in 1942. My feeling, upon an analysis of his letters in the past and the recent change in position, is that brooding over his sentence, he has come to believe that certain things occurred which never existed. Obviously, the sentence I gave him was somewhat severe. Yet, in my discretion as trial Judge, I believed the facts and circumstances to be such as to justify the sentence.

And further deponent sayeth not.

/s/ WALTER C. LINDLEY.

CERTIFICATE

State of Illinois,

Vermilion County—ss.

I, Gertrude Downey, A Notary Public within and for the County of Vermilion and State of Illinois, the officer acting by virtue of authority in Notice to Take Deposition, the original of which is hereto attached and made a part hereof, in the taking of the deposition of said Walter C. Lindley, the witness, do hereby certify that previous to the

(Deposition of Walter C. Lindley.)

commencement of the examination of said Walter C. Lindley, as witness in the cause entitled Cecil Wright, Petitioner, vs. James A. Johnston, No. 23647-S, he was duly sworn to testify the truth in relation to the matter in controversy between the above named Petitioner and Respondent, [106] so far as he should be interrogated concerning the same; that said deposition was taken down by me in shorthand, at the office of the United States Attorney for the Eastern District of Illinois, in the Post Office, at Danville, Illinois, on the 23rd day of July, A.D., 1942, commencing at the hour of 10:00 a.m. of said day; that said deposition was taken upon oral interrogatories propounded by Ray Foreman, Esquire, Assistant United States Attorney, and said interrogatories, and the answers thereto, were reduced to writing by me, and the foregoing deposition is a full, true and correct transcript of the testimony of said witness, given at the time and place aforesaid, and in the order in which said oral interrogatories and the answers thereto were given.

That the signature of said witness is the genuine signature of said witness, Walter C. Lindley:

I further certify that I am not of counsel or attorney for either party in said cause, and am not interested in the outcome of said case.

I further certify that my commission expires on the 14th day of October, A.D., 1943, and is, at the

time of the making of this certificate, in full force and effect.

Given under my hand and official seal, at Danville, Illinois, this 25th day of July, A.D., 1942.

[Seal]

GERTRUDE DOWNEY,
Notary Public.

My Commission expires Oct. 14, 1943. [107]

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION

To Cecil Wright, Petitioner:

You will please take notice that on Thursday, July 23, 1942, at 10:00 o'clock a.m. the deposition of Walter C. Lindley, United States District Judge for the Eastern District of Illinois, will be taken before Gertrude Downey, Notary Public, or any other Notary Public of competent authority who is not of counsel or attorney for either party or interested in the outcome of the case, at the office of the United States Attorney for the Eastern District of Illinois, Danville, Illinois;

That said deposition is to be taken upon oral interrogatories and pursuant to the provisions of the Revised Statutes of the United States and the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, Chapter 651, and will begin, as above

stated, at 10:00 o'clock a.m. of said day and will continue from day to day thereafter until completed, transcribed, signed and properly attested to. It shall then be forwarded by said Notary Public to the Clerk of the United States District Court, Southern Division of the Northern District of California, San Francisco, California, under the proper case heading and number as above set out. [108]

Dated: July 17, 1942.

FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed Aug. 13, 1942.

[Title of District Court and Cause.]

DEPOSITION OF HAROLD G. BAKER

Deposition of Harold G. Baker, of the County of Saint Clair and State of Illinois, a witness of lawful age, produced, sworn and examined on his corporal oath, on the 29th day of July, A. D. 1942, in pursuance of Notice of Taking Deposition, dated July 24, 1942, to be continued from day to day until the completion of said Deposition, which said Deposition was continued by me on July 24, 1942, to July 29, 1942, at the office of the United States District Judge, Federal Building, East St. Louis, Illinois, as a witness in a certain suit and matter in controversy now pending and undetermined in the said District Court, in the Southern Division of the United States District Court, for the North-

ern District of California, wherein Cecil Wright is Petitioner, and James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, is Respondent, case No. 23647-S., on behalf of the Respondent herein, upon oral interrogatories. [109]

Appearances: For Respondent: H. Grady Vien, United States District Attorney, for the Eastern District of Illinois; and Ray Foreman, Assistant United States District Attorney for the Eastern District of Illinois. For Defendant (Petitioner): Petitioner not present and not represented by Counsel.

HAROLD G. BAKER

being first duly sworn by me as a witness in said cause, previous to the commencement of his examination, to testify the truth, as well on the part of Petitioner as the Respondent, in relation to the matter in controversy herein, as far as he should be interrogated, testified and deposed as follows:

Direct Examination

By Mr. Vien:

Q. State your name, please.

A. Harold G. Baker.

Q. What is your business? A. Lawyer.

Q. Your offices are where?

A. Murphy Building, East St. Louis, Illinois.

Q. How long have you been practicing law?

A. I was admitted in 1921.

Q. Where have you practiced since that time?

A. In East St. Louis. [110]

(Deposition of Harold G. Baker.)

Q. What has been the nature of your practice since 1921, Mr. Baker?

A. I was in the general practice of the law with my father for a time after I was admitted to the Bar. I was then in the firm known as Keefe, Baxter, Miller and Baker which represented various railroads and corporations. In 1926, I was appointed United States Attorney for the Eastern District of Illinois and served and devoted my full time to those duties until 1931. In 1931, Mr. Lesemann, who had been my chief assistant while I was United States Attorney, and I started the practice of law together, the firm being Baker and Lesemann. Subsequently, other members were admitted to the firm and it is now composed of Baker, Lesemann, Kagy and Wagner. We are engaged in the general practice representing such concerns as the Southern Illinois National Bank, the Western Union Telegraph Company, Aetna Casualty and Insurance Company, Western Insurance Company and concerns of that sort.

Q. You have had extensive practice in the Federal Court in the Eastern District of Illinois?

A. Yes, both before and after I was United States Attorney.

Q. You have represented defendants in criminal cases?

A. Yes, sir, numerous criminal cases.

Q. During the time you were United States [111] Attorney from 1926 to 1931, what was the

(Deposition of Harold G. Baker.)

nature of the work you personally did in the office?

A. I handled cases from the time a complaint was received in the office, drafted informations and indictments and handled the matters before the grand jury and tried cases myself. There were, at that time, two assistants who were also engaged in the same sort of work. One in Danville and one in East St. Louis. Mr. John Speakman, who died a few months ago was the assistant at Danville and Mr. Ralph Lesemann, now one of my law partners, was the assistant at East St. Louis.

Q. In the case of the United States of America versus Cecil Wright, Number 11032, did you personally handle any part of that case?

A. My recollection is, Mr. Vien, I handled the entire matter from the time the first reports of the burglary at Strasburg were received until conviction and the last official act I think I performed in the case was in submitting the parole reports in accordance with the procedure then in force and those were dictated by me.

Q. Was there other defendants?

A. Yes. My recollection is there were numerous other defendants and the question arose at the inception as to who would be charged with the various offenses. These men had been arrested, as I recall, in Decatur, Illinois, which is in the Southern District of Illinois, in possession of rifles, field glasses and automatic pistols which had been stolen [112] from the armory at Sullivan, Illinois, which is in the Eastern District of Illinois, and subsequently

(Deposition of Harold G. Baker.)

some of them were identified as having been engaged in the robbery of the post office at Strasburg and others were found in the possession of a stolen automobiles with the result that we divided the charges and indicted one group for the Strasburg robbery and I think two other individuals for the theft of the automobile and their transportation of the automobile in interstate commerce.

Q. Was Cecil Wright one of the defendants in that case?

A. Yes, my recollection is that Cecil Wright was indicted in the Strasburg robbery, in case number 11032, and also indicted for the transportation of the stolen automobile, having been arrested in the stolen automobile at Gary, Indiana, and that was case number 11074, I think.

Q. Did you personally participate in the trial of Case Number 11032?

A. The files of the United States Attorneys Office, which I have examined, show on the file cover in my own hand writing the arraignment, the appointment of counsel, and also show the name of the judge before whom the case was heard and the fact that there was a trial by jury, and the sentence. Also on that file is a notation in the hand writing of William C. Ingram, which I recognize, showing the defendants were notified on August 29, 1930 that the case was set for trial on September [113] 17, 1930. Certain of the defendants were in various penitentiaries. Monte Crist was in the Indiana State Penitentiary at Michigan City, In-

(Deposition of Harold G. Baker.)

diana, and it was necessary for us to secure a writ of habeas corpus ad prosequendum. This issued sometime in the summer of 1930 and Governor Leslie of Indiana refused to allow the Warden to recognize the writ.

Q. Who was William C. Ingram?

A. Assistant United States Attorney. Prior to his being admitted to the bar he had been chief clerk in the United States Attorney's office but my recollection is that by 1930 he had been admitted to the bar and upon his admission he was appointed as an assistant United States Attorney, performing the duties of chief clerk in the office of the United States Attorney.

Q. Do you have a recollection of the actual trial of this case, Mr. Baker?

A. Yes, I recall the defendants were arraigned on the 16th of September, 1930; that Judge Lindley advised them as to their right and as to his duties in the event a plea of guilty was entered and their right to counsel. They advised the court they were without counsel and Judge Lindley appointed J. D. Allen of Danville to represent them.

Q. Was he appointed to represent all of them?

A. That is my recollection.

Q. What day was he appointed?

A. September 16, 1930. [114]

Q. What was the date of the trial?

A. September 17, 1930.

Q. Were the defendants in court at the time Mr. Allen was appointed?

(Deposition of Harold G. Baker.)

A. Yes, Mr. Allen was appointed at the time of their arraignment, I believe. He was there at the time of the arraignment and at the trial.

Q. Did they make any objection concerning Mr. Allen's appointment at the time it was made?

A. None that I recall.

Q. Do you know whether the defendants, including Cecil Wright, conferred with Mr. Allen in regard to the case?

A. Mr. Allen conferred with the defendants immediately after his appointment and came to the office of the United States Attorney which was down the hall from the court room at Danville, and asked to see certain portions of the file and we gave him the information he desired and whether he went back and discussed the matter with them in the afternoon, I wouldn't know, but I imagine he did.

Q. Did you know J. D. Allen prior to his appointment in this case?

A. Yes, for four or five years prior to the time of this incident.

Q. Had he ever appeared in the Federal Court of the Eastern District of Illinois representing defendants in criminal cases prior to that time?

A. Yes, he had an extensive practice in [115] Danville and the surrounding territory and had appeared in civil matters and criminal matters in the Federal Court.

Q. What would you say was the character and

(Deposition of Harold G. Baker.)

standing of Mr. Allen as a member of the bar of the Federal Court at that time?

A. I have and had the highest regard for his honesty and integrity and his ability as a lawyer. He always protected his client's interests and he knew the law and was adept in following it in a given case. He was a good lawyer.

Q. Was any objection made by Cecil Wright to you or to Judge Lindley prior to the time of the commencement of the case concerning the appointment of J. D. Allen as attorney for Cecil Wright?

A. None. No representation was made to me and none to Judge Lindley to my knowledge indicating that Cecil Wright was dissatisfied with the appointment of Mr. Allen.

Q. Were any objections made by Cecil Wright during the trial of the case?

A. None. He made no objection whatever to the appointment or the action of Mr. Allen. The first knowledge I had of this matter was when you gentlemen advised me of the fact you wanted to take my deposition, which was about a week or two ago. In the meantime I have had an opportunity to go into the correspondence between Cecil Wright and myself while he was incarcerated in [116] the Southern Illinois Penitentiary and in none of the correspondence did he ever protest about the action of the trial court and the first knowledge

(Deposition of Harold G. Baker.)

I had of the charges he now makes, as I said, was about two weeks ago.

Q. Did Cecil Wright ever make any objection or criticism to you personally or by letter of the method of the conduct of the trial by his attorney, Mr. Allen?

A. No and he had ample opportunity so to do over a long period of time because as I said awhile ago, there was some correspondence with him and my recollection is that he wrote a letter to Prat Taylor, who was then a Deputy United States Marshal, concerning certain of the crimes which had been committed by the gang he had been associating with, which letter, according to the records in the file, I forwarded to K. P. Aldrich who was then Post Office Inspector in charge at Chicago and who is now Chief Post Office Inspector. I also recall, after reviewing the file, Wright wrote me about certain crimes with which he was associated and I referred his letters to the Special Agent in charge of what was then the Bureau of Investigation of the Department of Justice in St. Louis.

Q. Did Cecil Wright, to your knowledge, ever request the appointment of any other attorney?

A. No, sir.

Q. What would you say as to the conduct of [117] the trial of Cecil Wright by J. D. Allen as to whether he had a fair trial?

A. In my opinion, he did have a fair trial. In

(Deposition of Harold G. Baker.)

my opinion, Mr. Allen protected the interest of Cecil Wright throughout the entire trial.

Q. Did Mr. Allen ever make a motion for a continuance of the trial of the case?

A. My recollection is that Mr. Allen came in on the morning of the trial, which was some 24 hours after he had been appointed and stated to the Court, on behalf of the defendant Wright he wished to move for a continuance and presented some sort of affidavit. The matter was argued before Judge Lindley and I resisted the motion because as I say, he had had several weeks at least to prepare for the trial, having been notified in August as to the date the case was set for trial, and subsequently, it is my recollection, immediately after the motion for continuance was denied, Mr. Allen made an oral motion for a severance and Judge Lindley said at that time that he would keep in mind the situation which Mr. Allen presented and did so in his charge to the jury.

Q. Was there a motion to "squash" filed by Mr. Allen on behalf of his client?

A. No, no demurrer to the indictment or any motion of that nature was ever filed.

Q. The indictment was never attacked in any manner, shape or form? [118]

A. That's my recollection, either in Case Number 11032 or the companion cases.

Q. And was any motion made by you, as United States Attorney at the close of the plaintiff's case or at the close of all the evidence to "squash" the

(Deposition of Harold G. Baker.)

indictment or dismiss the case as to Cecil Wright and discharge him?

A. No, no such motion was ever made by me in this matter and there is no recollection on my part and no indication in or on the file that I ever made any motion to dismiss or nolle as to Cecil Wright.

Q. Mr. Baker, you have made a close examination of the files of the office of the United States Attorney in case Number 11032 and the companion case Number 11074 and also the court files in the office of the clerk of this Court have you not?

A. Yes, Mr. Vien. After you advised me you wanted to take my deposition, at my request you made available to me the files that started during my term as United States Attorney in cases number 11032 and 11074, the latter being the second case in which certain of the defendants in 11032 were charged with the violation of the National Motor Vehicle Theft Act and in which the defendants, including Cecil Wright, entered a plea of guilty after the verdict of the jury had been entered in 11032.

Mr. Vien: That is all.

HAROLD G. BAKER. [119]

CERTIFICATE

State of Illinois,
Saint Clair County—ss.

I, Walter Elliott, a Notary Public within and for the County of Saint Clair and the State of Illinois, the officer acting by virtue of authority in Notice to Take Deposition, the original of which is hereto attached and made a part hereof, in the taking of the deposition of said Harold G. Baker, the witness, do hereby certify that previous to the commencement of the examination of the said Harold G. Baker, as witness in the cause entitled Cecil Wright, Petitioner vs. James A. Johnston, No. 23647-S, he was duly sworn to testify the truth in relation to the matter in controversy between the above named Petitioner and Respondent, so far as he should be interrogated concerning the same; that said deposition was taken down by me in shorthand, at the office of the United States District Judge for the Eastern District of Illinois, in the Post Office, at East St. Louis, Illinois, on the 29th day of July, A. D. 1942, commencing at the hour of 11:00 a.m. on said day; that said deposition was taken upon oral interrogatories propounded by H. Grady Vien, Esquire, United States Attorney, and said interrogatories, and the answers thereto were reduced to writing by me, and the foregoing deposition is a full, true and correct transcript of the testimony of said witness, given at the time and place aforesaid, and in the order

in which said oral interrogatories and the answers thereto were given. [120]

That the signature of said witness is the genuine signature of said witness, Harold G. Baker:

I further certify that I am not of counsel or attorney for either party in said cause, and am not interested in the outcome of said case.

I further certify that my commission expires on the 27th day of September, 1942, and is, at the time of the making of this certificate, in full force and effect.

Given under my hand and Official Seal, at East St. Louis, Illinois, this 31st day of July, A. D. 1942.

(Seal)

WALTER ELLIOTT,
Notary Public.

My commission expires: September 27, 1942.

[Endorsed]: Filed August 3, 1942. [121]

RESPONDENT'S EXHIBIT A

No. 23647-S

In the District Court of the United States
For the Eastern District of Illinois

Criminal Docket

Docket 11032

Title of Case.

THE UNITED STATES vs. ROBERT RAY-
MOND, CARL SANDERS, JOSEPH HART-
MAN, MONTE CRIST, TUCK WRIGHT—
whose true Christian name is to the Grand
Jurors unknown.

Strasburg Shelby Co. Bond \$10,000

Indictment—Postal Law

Attorneys: For U. S.: Harold G. Baker. For
Defendant: J. D. Allen.

Abstract of Costs.	Amount.
	10000 “
	10000 “
Fine,	10000 “
	10000 “

Clerk,
Marshal,
Attorney,
Commissioner's Court,
Witnesses,

1930

Proceedings

June 5—Enter return of Indictment—File Indict-
ment

Respondent's Exhibit A—(Continued)

1930

Proceedings

- June 5—Enter Order B. W. Issue B. W.
- Aug. 29—File two praecipes—issue 2 subpoenas
- Aug. 29—Enter order for writ of Habeas Corpus ad Prosequendum for Monte Crist from Indiana State Penn to Danville Sept. 17, 1930 and return
- Aug. 29—Enter Order for Writ of Habeas Corpus ad Prosequendum for Carl Sanders, Robert Raymond, Joseph Hartman & Tuck Wright from So. Ill. Penn. to Danville Ill, Sept. 17-30 and return
- Sept. 8—File subpoena. Service on Rono Keefe 9/2/30
- Sept. 16—Enter plea of not guilty, Robert Raymond, Carl Sanders, Joseph Hartman and Tuck Wright. [123]
- Sept. 16—Atty. J. D. Allen appointed to defend
- Sept. 17—File return on Writ of Habeas Corpus ad Pros.
- Sept. 17—Enter proceeding of trial by jury of Defendants Robert Raymond, Carl Sanders, Joseph Hartman, Tuck Wright
- Sept. 17—Enter Verdict of Jury, guilty as to each Defendant and Sentence
- Sept. 17—Each Defendant 5 yrs. on 1st count. 3 yrs. on 2nd count and 2 yrs. on 3rd count, in the U. S. Penn. at Leavenworth and fined \$10,000.00. All sentences to be served con-

Respondent's Exhibit A—(Continued)

1930 Proceedings

secutively and begin on their release or
discharge from the So. Ill. Penn.

Sept. 17—Issue certified copy of sentence.

Sept. 17—Issue Warrant to Convey

Sept. 18—File Subpoena, due service on Wm. Wil-
son, Otto Wirth, Wm. Foster, Ralph
Terry 9/1/30. Returned unexecuted as to
Walter C. Bisson

Dec. 5—Strike with leave to reinstate as to Dft.
Monte Christ [124]

1931 Proceedings

Jan. 16—File B. W. ret's unexecuted—sentenced
9/7/30

1934

June 22 File Petition for modification of sentence
and/or probation—Jos. Hartman (see also
11073)

June 22—Enter hearing on said Petition. Same
denied.

1930

Sept. 17—Issue warrant to convey Robert Ray-
mond.

Case No. 11032 The U. S. vs. Robert Raymond, et al.

1934

Nov. 15—File Warrant to Convey Deft. Robert
Raymond del to U. S. Pen. at Leaven-
worth, Kansas on 11/13/34.

1939

Nov. 7—File certified copy of Sentence—duly ex-
ecuted by delivering Tuck Wright to U. S.

Pen at Leavenworth, Kansas on November 1, 1939.

June 19—File Motion & Affidavit for transcript of
Record to be furnished in Forma Pauperis

1942 Proceedings

(Here follows copy of Indictment which was previously set out at pp. 120-124 of this printed record.)

In the District Court of the United States
For the Eastern District of Illinois

Tuesday, September 16, 1930

Present: Honorable Walter C. Lindley, Judge.

No. 11032

THE UNITED STATES

VS.

ROBERT RAYMOND, CARL SANDERS, JOSEPH HARTMAN AND TUCK WRIGHT

INDICTMENT

VIOLATION POSTAL LAWS

And Now on this 16th day of September, A. D. 1930, comes the United States, the plaintiff in this

Respondent's Exhibit A—(Continued)
case, by Harold G. Baker, United States Attorney for the Eastern District of Illinois, and comes also the defendants Robert Raymond, Carl Sanders, Joseph Hartman and Tuck Wright each in person. And the said defendants being arraigned on [126] the indictment herein for plea thereto, each says that he is not guilty as therein charged; and now it appearing to the court that said defendants are without legal counsel to defend them and are unable to secure such counsel, it is ordered by the Court that J. D. Allen, an attorney and counsellor of this court, be and he is hereby appointed to defend the said Robert Raymond, Carl Sanders, Joseph Hartman, and Tuck Wright.

* * * * *

Respondent's Exhibit A—(Continued)

THE JURY'S VERDICT

We, the Jury find the defendants Carl Sanders, Tuck Wright, Joe Hartman and Bob Raymond guilty in manner and form as charged in the indictment.

No. 11032

/s/ D. C. BURROW,
Foreman

/s/ S. S. WILSON

/s/ MARK W. WISEMAN

/s/ G. W. GILLILAND

/s/ J. W. SNIDER

/s/ CHARLES TILTON

/s/ H. R. BOESCHEN

/s/ OSCAR FORTH

/s/ D. E. FRITZ

/s/ WM. BASINGER

/s/ HARRY BEARD

/s/ STEPHEN GANNON

[Endorsed]: [127]

(Here follows copy of Order of the Trial Court made on September 17, 1930, previously set out at pp. 60-61 of this printed record.)

(Here follows affidavit of Tuck Wright previously set out at pp. 110-112 of this printed record.)

Respondent's Exhibit A—(Continued)

In the District Court of the United States
For the Eastern District of Illinois

No. 11032

UNITED STATES OF AMERICA

vs.

CECIL WRIGHT

Lindley, Judge.

MEMORANDUM OF FINDINGS AND CON-
CLUSIONS UPON MOTION TO VACATE
JUDGMENT.

The court has examined the motion of defendant Cecil Wright to vacate the original judgment entered September 17, 1930, as well as his application for leave to file the same as a poor person.

The leave to file the motion as a poor person is allowed.

The motion to vacate the judgment is denied.

Nothing occurred at the time of the trial justifying the allegations of fact made by defendant. [128] Counsel appointed to represent him, though colored, was a reputable, capable and experienced member of the bar. He was given full access to all of the information in the files of the United States Attorney with regard to each defendant. There appeared a transcript of the statements of all witnesses. Thus defendant and counsel were fully advised as to just what would be presented against defendant.

Respondent's Exhibit A—(Continued)

The evidence disclosed that defendant participated in banditry and robbery with the use of a sawed off shot gun and other lethal instruments; that he and his associates overpowered and tied up the watchman and policeman and disclosed and exercised a lawless intent of most serious character. The jury heard the evidence. Each defendant was identified. There was no question as to guilt and the jury could have reasonably returned no other verdict.

In the companion case No. 11074, Wright entered a plea of guilty and received a sentence of five years, made to run consecutively to that imposed in this cause.

Defendant insists that the sentence is void and, therefore, may be vacated, but there is nothing to sustain this assertion.

The circumstances were such as the court believed justified it in denying the motion for continuance and for a separate trial. If error actually occurred, defendant's remedy lay in appeal.

The court made no agreement of any character [129] with defendant or his counsel to the effect that if other defendants would plead guilty, defendant would be acquitted. The allegation is pure fabrication.

The confessions of other defendants were received as evidence only against those making them and the jury was expressly so instructed.

The judgments are in the exact form they were

Respondent's Exhibit A—(Continued)

entered on the date of entry. There has been no post-dating and no modification. The record speaks for itself.

Defendant has untrammelled and unimpaired assistance from reputable counsel who served him faithfully and properly protected in full all of his rights.

There was no instruction to the jury that defendant should be found guilty but the jury was instructed that each defendant was to be tried only upon the evidence submitted against him and that he must be proved guilty by such evidence beyond all reasonable doubt.

Defendant insists that in sentencing him, inasmuch as he was under execution of sentence in another institution, the court could not impose upon him another to begin at the termination of that which he was then serving. The law is to the contrary. In *Ex Parte Lamar*, 274 Fed. 160 at 176 the Circuit Court of Appeals for the Second Circuit expressly decided this point, saying that the district court was not prohibited from fixing the [130] date of commencement of the term as the time when the prisoner finished a sentence he was then serving. The court commented that to hold otherwise would be to make a mockery of the law and stultify the course of justice. This decision was affirmed by the United States Supreme Court in 260 U. S. 711. Other courts holding that a sentence of imprisonment may properly commence upon the expiration of a preceding sentence are *Howard v.*

Respondent's Exhibit A—(Continued)

U. S., 75 F. 986; U. S. v. Farrell, Federal Case 15,074; 5 D. C. 311; In re Jackson, 10 D. C. 24.

I have reviewed the facts, examined carefully the record. Most of what defendant sets forth amounts at the most to an allegation of error in the action of the court at the trial. Such error may be taken advantage of only by appeal. That there was none would seem obvious from the fact that for twelve years, defendant prosecuted no appeal. Such error does not invalidate a judgment. The court has no power at this date to review or modify a sentence entered in 1930, because it is now alleged that error was committed at the time of the trial.

Consequently the motion is denied.

Entered this 3rd day of July, A. D. 1942.

/s/ WALTER C. LINDLEY,
Judge.

[Endorsed]: 11032. U. S. Cecil Wright. Memo of Findings and Conclusions upon Motion to Vacate Judgment. Filed Jul 3, 1942. D. H. Reed, Clerk.

GOVERNMENT'S EXHIBIT No. 1

Case No. 140,499-D

STATEMENT OF ROBERT RAYMOND

State of Illinois,
County of Edgar—ss.

I, Robert Raymond, being first duly sworn, depose and state:

I am 25 years of age and my home is in Cleve-

Respondent's Exhibit A—(Continued)

land, Ohio. I am making this statement in connection with the burglary of the post office at Strasburg, Illinois, on the early morning of April 9, 1930, without any promise of reward, or threats being made, knowing that the same may be used against me.

On the evening of April 8, 1930, Monte Crist, Tuck Wright, Joe Hartman, Carl Sanders and I left Decatur, Illinois, in two automobiles. I was riding with Hartman in a four door sedan, while Crist, Wright and Sanders were in the two door sedan. Both machines were model "A" Fords. We drove around the country and sometime after midnight passed through Strasburg, Illinois, and drove on to Stewardson, Illinois. We drove out on the highway between Strasburg and Stewardson and discussed whether we would make Stewardson or Strasburg, but finally agreed to go to Strasburg. It was agreed that Hartman and I would drive into town and "Take" the night watchman, then signal to the other fellows to come in, which was done. [132] We stuck up the nightwatchman and I signalled to the other fellows with a flash light. We searched the watchman and took from him his .25 caliber revolver, badge, keys and some money and then tied his hands behind him and put him in the four door sedan with Carl Sanders guarding him. His keys were not taken until he had been placed in the automobile. At the time, we thought some of the keys would fit the doors of the stores.

After we tied up the watchman, we drove both

Respondent's Exhibit A—(Continued)

cars around the corner to the front of the merchandise store and four of us went over to the store and tried the keys on the two front doors, but the keys did not fit and we were unable to open the doors. I went back over to the four door sedan and got a crow bar that we had there and went to the side door of the store and forced it open. Wright, Crist, Hartman and I went into the store, Wright and Crist went to the rear, Hartman over to one side and I went up to the front part of the store. I overheard Wright make a remark about the safe being open and empty. Wright went up the street and was gone about 10 minutes, when he came back and asked for the crow bar. I gave the bar to him and asked him what he was going to do and he replied that he was going to go up the street and see what he could see. I did not see him again until just before we left town. When Wright left with the bar, we went outside the store and saw a truck that had just come into town. He pulled around the corner and Hartman and I jumped in our car [133] and went after him. We found him asleep in his truck and stuck him up and took his money from him, as he had nothing else. We took him back to the four door sedan, tied his hands, and put him in the car with Sanders and the watchman. Hartman and I went back over to the merchandise store and saw a truck that had just pulled up in front of the tire store that is located in the rear of the merchandise store. We stuck him up and Hartman and Crist took him in the tire store where

Respondent's Exhibit A—(Continued)

they tied his hands and his feet and sat him in the corner.

I went out to the filling station and pumped the glass tank full of gas while Hartman went after the two door sedan, brought it over and filled it with gas and backed it up to the side door of the merchandise store. Crist stood guard in the tire store while this was being done and later went in the merchandise store to load up the car with the loot that had been chosen. Hartman went after the four door sedan and returned with Sanders and the two prisoners. They were taken in the tire store with the third captive and left there.

Just previous to the time that we left town and while we were in the tire store with the prisoners, Wright came back from up the street and I did not see what he had with him. Whatever he had he put in the two door sedan and he, Crist and Hartman got into it and pulled out. We went to Mattoon for breakfast and later went to Sky Line Springs where we stayed until noon. During the [134] afternoon we drove back into Decatur and just before reaching town we stopped at the side of Route No. 121 and discussed what we were going to do. Tuck Wright said that he had another job in another small town near Decatur that would be similar to the one at Strasburg, but Crist and I disagreed with him on it. Sanders also disagreed with and later on Sanders told me that he was sore because Wright had entered the post office in Strasburg.

Respondent's Exhibit A—(Continued)

While at Strasburg, Illinois, four of us were armed with .45 caliber Colts automatic revolvers and one with a .38 caliber police special revolver. We also had two 12-gauge shotguns and three Springfield army rifles.

I did not see any of the musical instruments that were taken from Strasburg, Illinois, until we were arrested at Decatur. After our arrest, I saw a guitar hanging on the walls of the Sheriff's office and I was told it was taken from Rommel's house on the night the police made the raid at that place.

Wright has two brothers, a wife and two children living in Mattoon, Illinois, and one brother living in Charleston, Illinois. He is not divorced from his wife, but he does not live with her. Their home is somewhere between 9th and 16th street on Route No. 16 in the city of Mattoon.

/s/ ROBERT "BOB" RAYMOND.

Subscribed and sworn to before me at Paris, Illinois, on this the 14th day of May 1930.

/s/ RONO KEEFE,

Post Office Inspector. [135]

Witnesses:

/s/ JEROME WILLIAMSON

/s/ ROSCOE RIVES

/s/ ROY JOHNSON

/s/ R. E. RAGAINS

/s/ CHARLES DANNY

Respondent's Exhibit A—(Continued)

GOVERNMENT'S EXHIBIT No. 2

Case No. 140,499-D

STATEMENT OF JOSEPH G. HARTMAN

State of Illinois,

County of Edgar—ss.

I, Joseph G. Hartman, being first duly sworn, deposes and states:

This statement is being made in connection with the burglary of the post office at Strasburg, Illinois, on the early morning of April 9, 1930, without any promise of reward, or threats being made against me, knowing that the same may be used in the prosecution of the case.

On the night of April 8, 1930, Carl Sanders, Monte Crist, Tuck Wright, Bob Raymond and I left Decatur, Illinois, in two automobiles. We drove around the country for some time, and I was riding in the four door sedan with Bob Raymond. Sanders, Crist and Wright were riding in the two door sedan. Both of these cars were model "A" Ford machines. [136] Some time after midnight, we drove through the town of Strasburg, Illinois, and some one of the fellows suggested that we make that place. It was agreed and Raymond and I drove back into town where we stuck up the night watchman and then signalled with a flash light for the other fellows to come in. I held a gun on the watchman while Raymond searched him. We took his pocketbook, keys, badge and gun and tied his hands behind him. The other car came into town and all of the fellows got out of it. The watchman was taken to the rear

Respondent's Exhibit A—(Continued)

of the building where he was searched and he was then placed in the rear of the four door sedan, with Sanders in the front seat to guard him. After we had entered one of the stores we went down the street and made captive of a bread truck driver, who was also searched and placed in the same car with the night watchman. After we had been in town for some time, a third man came in driving a truck and we tied him up in a garage and left him there. When we left town we, also, took the watchman and the driver of the bread truck to this garage and left them.

We got about \$12.00 in money from the robbery at Strasburg and about two baskets full of merchandise. I saw the neck of some kind of a musical instrument in the back end of the two door sedan, but do not know whether it was a guitar or mandolin.

Sometime late the afternoon of the 9th, we [137] arrived at Decatur, Illinois, and I went to the railroad Y.M.C.A. where I had a room.

/s/ JOSEPH G. HARTMAN.

Subscribed and sworn to before me at Paris, Illinois, on this 14th day of May, 1930.

/s/JEROME WILLIAMSON,

Post Office Inspector.

Witnesses:

/s/ ROSCOE RIVES.

/s/ ROY JOHNSON.

/s/ CHARLES DANNY.

/s/ RONO KEEFE.

Respondent's Exhibit A—(Continued)

GOVERNMENT'S EXHIBIT No. 3

Case No. 140,499-D

STATEMENT OF CARL SANDERS

State of Illinois,

County of Edgar—ss.

I, Carl Sanders, being first duly sworn, deposes and state:

This statement is being made in connection with the burglary of the post office at Strasburg, Illinois, on the early morning of April 9, 1930, to aid in the investigation of that case, without any promise of reward, or any threats being made against me, knowing that the same may be used against me.

On the night of April 8, 1930, Monte Crist, Tuck [138] Wright, Joe Hartman, Bob Raymond and I, left Decatur, Illinois, in two automobiles. I was riding in a two door Ford sedan with Crist and Wright. Raymond and Hartman were in a four door Ford Sedan. Both were model "A" machines. Sometime after midnight we drove through the town of Strasburg, Illinois, and some of the boys suggested that we make that place. Some one in the crowd said we would have to find the "Night clown," so it was agreed, and Raymond and Hartman drove back into town and circled around the block, found the night man and stuck him up. They then gave us the signal to come in. I was driving the car and we drove up along side of the four door

Respondent's Exhibit A—(Continued)

sedan and everyone got out. Some of the fellows took the watchman to the side of a building and tied his hands. They then brought him to the car that Hartmand and Raymond were in and placed him in the back seat, while I sat in the front seat, about two hours, during the time the other fellows broke in the stores and post office.

About an hour before we left town Tuck Wright came up to the car and asked the night watchman for the keys to the post office, bank and the stores. The watchman informed him that he did not have any of the keys to the buildings. Wright, at the time, asked the watchman if the .25 caliber automatic revolver belonged to him and he also asked him what he expected to protect with that gun. Wright further stated that he would bring the [139] watchman a good gun when he came back to rob the bank. Wright also questioned the watchman as to whether there was a safe in the post office and wanted to know if there was any money in it, but the watchman was unable to inform him. Wright then went away and I did not see him again until after we had left town. When he made mention to the watchman about the post office, I advised him to stay away from it.

Leaving town, Wright, Monte Crist and Hartman were in the two door sedan, while Raymond and I were in the four door sedan, Raymond driving. None of the merchandise taken was placed in the car in which I was riding. We drove from

Respondent's Exhibit A—(Continued)

Strasburg to Mattoon to the home of Wright's brothers where we had breakfast. We went from there to Decatur, arriving about noon, going to the home of Lionel Rommel. I noticed that among the loot taken out of the car in which Wright rode, there were 1 guitar, 1 clarinet, and some merchandise. Wright was wearing a gold ring, with a ruby set, bearing the initial "F". We asked him where the musical instruments and ring came from and he told us that he had taken them from the post office in Strasburg.

I do not know if any of the other fellows broke in the Strasburg post office, but do know that they were "Sore" because Wright had gone into it. The fact that Wright entered the post office was one of the things that caused us to split up. [140]

All of the fellows that were at Strasburg were armed, Monte Crist had a .45 caliber Colt revolver, in fact all of the fellows had the same kind of a gun, except myself and I did not have any revolver. However, in the car in which I sat with the watchman, and a bread truck driver, who was brought to the car, for me to guard, there were 1 sawed-off shot gun and three army rifles laying at the feet of the prisoners. I do not know where the revolvers and rifles came from as the fellows had them when I joined them on April 1, 1930, at Casey, Illinois.

When Wright came up to the car to talk to the watchman about the post office, he wore a mask. I

Respondent's Exhibit A—(Continued)
did not see any of the other fellows wearing a mask while at Strasburg.

/s/ CARL SANDERS.

Subscribed and sworn to before me at Paris,
Illinois, on this 14th day of May, 1930.

/s/ RONO KEEFE,
Post Office Inspector.

Witnesses:

/s/ JEROME WILLIAMSON.

/s/ ROSCOE RIVES.

/s/ ROY JOHNSON.

/s/ CHARLES DANNY. [141]

GOVERNMENT'S EXHIBIT No. 4

STATEMENT OF CARL SANDERS

I, Carl Sanders, being now in the office of the State's Attorney of Macon County, Illinois, make the following statement of my own free will, no threats nor promises of any kind being made to me to get me to make this statement, and being informed by Victor C. Miller, State's Attorney of Clark County, Illinois, that any statement that I make may be used against me; this statement is being made in the presence of Victor C. Miller, Harry O. Coldren, Sheriff of Clark County, Illinois, F. A. Doolen, policeman and E. L. Doyle, Deputy Sheriff on this the 25th day of April, 1930.

My name is Carl Sanders and my home is Marblehead, Illinois, and my age is 34 years.

Respondent's Exhibit A—(Continued)

About a month ago Joe Hartman, "Shorty" Beasley and I were in Casey, Illinois and we saw two boys and one girl leave Casey about twelve o'clock at night. We knew that the boys and girls were from Greenup and had seen the boys and girl in a restaurant and they were talking pretty lively in the restaurant. The boys said that they were not going to take the girl home and she said "hell if they did not want to take me home I'll walk" and I think that Hartman or Beasley said "she did not have to walk that we would take her home." The other two boys said "we will take her home." They left and got in a car and we got into [142] Hartman's car and took out after them figuring that we would stop them and take the girl away from them and make the boys sore. We could not catch them after following them half way between Casey and Greenup. They turned into a barn lot and drove the car right into a barn and we stopped out along the road by a big tree and Hartman got out and went over to the barn and he came back back, and said "Oh hell they only had two dollars on them. Hartman took a gun with him when he went over to the barn in fact he was the only one that had a gun. The gun was a .45 Colt automatic. Beasley and I stayed in the car while Hartman went into the barn and held the boys up.

About a week later Joe Hartman, Mark "Smiles" Bowles and I were in Casey one night, we planned to hold up "Sycamore" Hills and we figured out the way to do it before we started and decided that

Respondent's Exhibit A—(Continued)

we would take him just as he got out of his car. We drove out on the pavement and parked about a block from his house about three o'clock in the morning; "Smiles" Bowles stayed in the car and Sycamore Hills drove by Bowles as he was parked. Previously Joe Hartman and I had gone to the barn and were waiting for Hills to drive into the garage. As he got out of the car I put a .45 Colts Automatic on him, told him to put his hands in the air which he did and Hartman went through his pockets. When he was told to put his hands up Hills said here is the change bag take it. He pulled [143] the change bag out of his pocket and there was \$18.00. We got around \$80.00 from Hills and my share was \$16.65. Hartman was armed with a .45 Colts. After we held him up we drove back to town and I went back to the farm where I was working.

In a couple of weeks later about April 13th, 1930 on Sunday night Joe Hartman, Bob Raymond, Monte Crist and I were driving around out in the country starting to a stone quarry to get some Nitro Glycerin, fuses and caps, and before we got to the quarry we ran onto a car approaching us, Crist was driving the car, and Crist pulled across the road and stopped the car, Crist, Bob Raymond and Joe Hartman got out of the car and I got under the wheel keeping the engine of our car running, and the other fellow put guns on a girl and a boy and they told them to get out of the car and they were searched at the point of the guns and got a diamond

Respondent's Exhibit A—(Continued)

ring, wrist watch (man's wrist watch), and I don't know whether they got any money or not.

The same night about an hour and a half later we ran across another car approaching us and I was driving the car, I drove across-wise the road in front of the car and stopped it, Monte Crist, Joe Hartman, Bob Raymond got out of the car and went up to the car and made the two men get out and held them up and got a wrist watch and tied both of them up with wire and took them to a school house about a half mile away. Before we left the car we cut the spark plug wires so that they could [144] not follow us. We took them to the school house so that they would not be out in the cold.

This Sunday night we had three Springfield rifles, two sawed off shot guns, two Colt .45 automatics, a 32, 38, 25 caliber revolvers in the car with us.

About in an hour or more we saw a car approaching west of Westfield in Clark County, Joe Hartman driving, and he drove accross the road and compelled the car to stop and Joe Hartman, Monte Crist and Bob Raymond got out of the car and went up to the car and made him get out of the car and searched him and then took him to a school house just over the line in Coles County and stripped him of his clothes and left him and went back and took his car and drove it away with us, Bob Raymond driving the car away, this was a Ford Roadster Model A.

The next night, Monday night I think after we had driven to Decatur, Illinois and back, we broke

Respondent's Exhibit A—(Continued)

in the back door of a Kroger Store in Casey and stole some cigarettes. I think about a carton and some cheese and crackers.

After we had held up the two boys and the girl west of Casey and Sycamore Hills a week or so later, Joe Hartman, Bob Raymond, Tuck Wright, Smiley Bowles came and got me at Smiley Bowles' home and told me that they were going to pull a big job at Mattoon, so I went with them in the Ford sedan that they were driving and went to a private garage and Bob Raymond and Monte Crist went in the garage and got a Reo Truck and we started [145] to Mattoon and went as far as Westfield where the truck got on fire. We stopped and put out the fire and abandoned the truck in the street in Westfield, leaving the truck right in the middle of the street.

On Thursday night about April 10th, 1930, Bob Raymond, Joe Hartman, Monte Crist, Tuck Wright and I drove two Ford sedans down to Strasburg, Illinois, and I stayed in the car and the other fellows brought the night policeman to the car where I was and left him with me and I talked to the policeman while the other boys were robbing a store. They got a car load of merchandise and loaded it into the other car and after that was done the policeman was tied up and left in the store that they had robbed.

A truck driver was tied up and put him in the same store with the policeman. He was all ready there when I saw him.

Respondent's Exhibit A—(Continued)

Smiley Bowles and Joe Hartman told me that Monte Crist, Bob Raymond, Tuck Wright, Smiley Bowles and Joe Hartman on the Hunk Finn holdup and that they got between \$100.00 and \$170.00. They told me that they went in the back door and Bowles and Hartman stayed on the outside and watched and all of them were armed with guns.

/s/ CARL SANDERS.

Witnesses:

/s/ VIRGIL BELCHER.

/s/ EDGAR L. DOYLE.

/s/ H. O. COLDREN.

/s/ L. E. STEPHENSON. [146]

GOVERNMENT'S EXHIBIT No. 5

STATEMENT OF JOSEPH GLENN
HARTMAN

I, Joseph Glenn Hartman, being now in the office of the State's Attorney of Macon County, Illinois, make the following statement of my own free will, no threats nor promises of any kind being made to me to get me to make this statement, and being informed by Victor C. Miller, State's Attorney of Clark County, Illinois, that any statement that I may make may be used against me. This statement is being made in the presence of Victor C. Miller, State's Attorney of Clark County, Illinois, Harry O. Colgren, Sheriff of Clark County, Illinois, V. A. Belcher, Deputy sheriff and C. A. Thrift, sheriff of

Respondent's Exhibit A—(Continued)

Macon County, Illinois, and L. E. Stephenson, Assistant State's Attorney of Macon County, Illinois, on this 25th day of April, 1930.

My name is Joseph Glenn Hartman and my age is 24 years and live at Casey, Illinois.

About six weeks ago on Saturday night about one o'clock in the morning, Monte Crist, Bob Raymond, Carl Sanders, Tuck Wright and I met at Sycamore Hills' Skating rink, and got to talking and needing some money decided to rob Huck Finn who is a clothing store man in Casey; Tuck Wright, Bob Raymond and I got in a Pontiac Coupe and the two others got in Ford Coupe and drove down to the highway and parked the car right at the side of the [147] store. Tuck Wright, Bob Raymond and Monte Crist went to the back door of the store and before they got to the back door a fellow by the name of Markwell came out of the back door so they made Markwell go back into the store. Tuck Wright, Bob Raymond and Monte Crist went into the store and held Huck Finn up. One of the fellows in the inside of the store threw a gun threw the front door. Bob Raymond went on the outside of the store and got the gun and General Bragg was standing across the street so Bob Raymond went and got Bragg and made him go into the Store. They got \$111.17 and on the split I got somewhere around \$22.00 out of the holdup. We drove out of Casey to the Oak Grove School where the split was made. During the time they were

Respondent's Exhibit A—(Continued)

holding up the store I stayed in the car watching to give the alarm if anyone came up.

The next Saturday night Carl Sanders, Ralph Beasley and I went out west of Casey in my Ford Coupe following two boys and a girl that we had seen in the White Way Cafe. We had been going to Greenup to dances and had seen the girl there before and we followed them and saw them turn into a barn and I parked out in the road and I got out and went into the barn, with my hat pulled down over my face told them to crawl out of the car and stand in the light of the car. I had a 45 Colt automatic with me and I told them to lay their pocket books and money on the fender and I [148] searched one of the fellows and I got \$3.95 and went back to the car and went on into Casey. During the time that I held up the two boys and the girl, Sanders and Beasley stayed in the car.

Carl Sanders, Smiley Mark Bowles and I met at Sycamore Hills' place of business and about when he got ready to go home we planned to hold him up, so we left before he left and went over to Hills' Garage and waited for Hills to come, parking the car on the pavement about two blocks away. When Hills came in Sanders put a gun on him and took between \$75.00 and \$80.00 off of him. I took the money off of Hills. Smiley Bowles stayed at the car. Sanders and I were masked. This was the next Sunday night I think after we had held up the two boys and girls. We three split the money and I got twenty-eight dollars.

Respondent's Exhibit A—(Continued)

The next job we pulled was at Strasburg, Illinois, when Monte Crist, Bob Raymond, Tuck Wright, Carl Sanders and I had been to Terre Haute, Indiana and got some beer to drink, we went back to Casey and while riding around we decided to go to Strasburg and hold up the general store for money and we drove on over to Strasburg and one car went into town and the other car stayed out of town. Boy Raymond and either Tuck Wright or Monte Crist went in and tied the town marshal and flashed a light and we drove on into town with the other car and Crist and Raymond went to the general store and pried the back door open and [149] Crist, Raymond and I went inside and Sanders stayed in the car with the night watchman and I don't know where Wright went but I think he went to night watchman's office and then there was a bread truck came in Raymond and I went down and tied him up and put him in the car with the night watchman. We went back down to the store and another truck came up and Raymond and Crist tied him up and took him to a garage and then put the night watchman and the other fellow in with him. When I got the second truckman tied up I went outside and they were in the cars ready to go. We got around \$12.00 in the general store. Tuck Wright told the night watchman that they would return and give him a good gun. I do not know how much merchandise we got out of the store but I did not take any of it. We drove to Sky Line

Respondent's Exhibit A—(Continued)

Springs that night and stayed there in the afternoon then came to Decatur.

We laid around in Decatur until Sunday night and we then went back down to Casey and laid over about four miles east of Casey all day sleeping in a barn and went to Martinsville for supper and went over southeast of Casey and held up a girl and her fellow. The girl was Juanita Cackley and I knew her. We drove up beside them and ordered them to get out of the car and three of us got out all with guns. Sanders or Crist went over to the car and I stood back of the car and they got about \$7.00 off of him, a diamond ring, and they took the [150] distributor brush off of his car so he could not follow us.

We then went a mile south of Casey and held up Ernest Blood and Vaughn Arney. As we met them we pulled in front of them and turned them around Crist and Raymond rode with them going two miles west and one half north to a school house and tied them up and gagged them got a pocket watch and a wrist watch and I don't know whether any money was gotten off of them or not. We were armed with guns. On this night we had a lot of guns in the car consisting of Springfield rifles, 45, 38, 32, 25 automatics and revolvers.

We went north of Oak Grove Log Cabins and started east on the Westfield road and over took a fellow driving a Ford Roadster, who was a school teacher by the name of Horner Raymond and I

Respondent's Exhibit A—(Continued)

got out after we had stopped him and took twelve dollars from him and took him in our Ford sedan and turned around and went back west to a school house and took him in and tied him up took his clothes, consisting of a suit and top coat and left him in his underwear. We got a wrist watch off of him. We were armed with Colt 45 automatics.

We went back east and to a mile north of Westfield driving the Ford roadster that we had taken from Horner and flagged a guy but he would not stop and he passed us in the Ford sedan and the Ford roadster turned on the lights and the fellow pulled up beside the road Raymond, Crist and I [151] got out searched him for guns and his money and then took him north about two miles and east a mile and took him to a school house and tied him up and Monte Crist took one fellows suit and we got ten dollars off of the two fellows. We were armed when he held him up.

We went east and north through Kansas and went to Paris and went up through Danville and I got in the Ford sedan and went to sleep in the back of the car and when I woke up they had parked the Ford Roadster along the road and we laid around in that country Monday and Tuesday and Tuesday night coming down from Watseka we went west from Watseka seventeen miles and turned north at Gilman and overtook four fellows and we took them back to a school house and got ten or eleven dollars from them, a fountain pen,

Respondent's Exhibit A—(Continued)
pencils a wrist watch and pocket watch, and come on south went into the edge of Bloomington and eat breakfast and come on into Decatur getting there about ten o'clock and stayed at the Lincoln Hotel and went out to Charleys Wilson's that night where we stayed until arrested.

/s/ JOSEPH GLENN HARTMAN.

Witnesses.

/s/ C. A. THRIFT.

/s/ VIRGIL BELCHER.

/s/ H. O. COLGREN [152]

GOVERNMENT'S EXHIBIT No. 6

STATEMENT OF ROBERT RAYMOND

I, Robert Raymond, being now in the office of the State's Attorney of Macon County, Illinois make the following statement of my own free will, no threats nor promises of any kind being made to me and being informed by L. E. Stephenson, Assistant State's Attorney of Macon County, Illinois that any statement that I may make may be used against me; this statement is being made in the presence of C. A. Thrift, V. A. Belcher, Victor C. Miller and Harry O. Coldren on this the 25th day of April 1930.

My name is Robert Raymond and I am 25 years of age and my home is Cleveland, Ohio.

About six weeks ago Monte Crist, Slim Wright, Smiles Bowles, Joe Hartman, Carl Sanders and I met in Casey, Illinois and decided to rob Huck

Respondent's Exhibit A—(Continued)

Finn's store so we drove beside the store and parked them and Joe Hartman and one of the other boys stayed in the two cars and the rest of us got out and went to the back door and we caught a fellow that had just come out of the store and we took him back with us and made him knock on the door and call to Huck to open the door. Huck came to the door and opened it rushed in and three fellows were sitting at a table and we lined all of the men up besides the rack and we went through them and got three or four dollars off the table and [153] a couple of dollars in change in the safe and got the rest off the men we had lined up, the biggest part of it coming off of Huck Finn. The four of us who went in were armed with 45 Colt automatic and two of us were masked. Monte Crist and Smiles Bowles were the two that was masked. A fellow came around snooping and one of the fellows threw a gun threw the front door and went out and got the fellow snooping around getting him across the street. He was brought in and lined up with the rest and then all were tied with neck ties. The fellow was called General Bragg or general nuisance or something. After we got them all tied up we all left.

Joe Hartman, Carl Sanders, Monte Crist and I stopped on the road on our way into Casey, and planned to rob Sycamore Hills and went down to his place of business and watched it and about when he was ready to close up his business we left and

Respondent's Exhibit A—(Continued)

went down to his garage and Carl Sanders and I planted ourselves in the garage and Hartman and Crist stayed in the car and when he came in and got out of his car we put our guns on him and tied him up. When Sanders put his gun on him he threw the money bag in the corner. We got the money bag and left. We got around \$75.00 on this job.

Carl Sanders, Joe Hartman, Slim Wright, Monte Crist and I went down to Strasburg, Illinois and drove through and went on to Stewardson and then came back and parked one car about a quarter of a [154] mile north of town and Joe Hartman and I went back to the town in one of the cars and found the night marshal on the corner and I drove up in front of him and put a gun on him and tied him up and put in the back of the car and got a little money off of him. I signalled to the other car to come on in with a flash light and they came in. We parked the cars on the main street opposite the main store of the town and went in the store from the side entrance and some of the boys got some cigarettes, candy, a couple of pairs of shoes, a grip and I do not know what all and about that time a truck driver rolled in so I went after him and he turned around the corner and I thought he went on out of town but Joe Hartman and I found him in his truck asleep. We put a gun on him and tied him up and took him to the car and put him in the car with the town marshal. We some money off of him, I do not know how much. Another fellow

Respondent's Exhibit A—(Continued)

in a truck pulled up to a tire store back of the general store and Monte Crist, Joe Hartman and I went and put our guns on him, tied him up and took him into the tire store and then got the town marshal and the other truck driver and put them all three in the tire store. We got some money off of the second truck driver also a 32 Harrison & Richardson revolver. We then all got into the two cars and left town and went around by Charleston and then went to Decatur.

On Sunday night, April 13th 1930 Monte Crist, Joe Hartman, Carl Sanders and I went from [155] Decatur, Illinois to Casey getting there about eight thirty and drove out east of Casey on a gravel road about a mile and one-half east of the hard or farther I guess and saw a car coming up behind us and we pulled cross-wise of the road and stopped the car and Hartman, Crist and I got out and put our guns on a boy and a girl who was in the car and made them get out and we got off of him and of the boy and a wrist watch I think off of him and a diamond ring off of the girl, tied his hands together and I took the distributor brush off and we drove on south and then swung west and crossed the hard road about a mile and come across two men in a Ford touring car stopped them and turned them around and took them to a school house and took them inside and tied them up and took what they had, consisting of a couple of watches and some money that was dropped in the car and some

Respondent's Exhibit A—(Continued)

money off of them. I do not know how much money we got. One of the fellows was a fat fellow and the other was slim. We left the car behind the school house and left the fellows in the school house tied up and drove on towards Charleston and about a mile from the Charleston hard road we came across a Ford roadster headed toward Westfield and we went after him and stopped him west of Westfield. We pulled in ahead of him and ordered him to stop and I ordered him to get out of his car and to get into our car and we took him back to a church a mile from the Charleston hard road, [156] stripped him tied him up and left him in the church. We took his car with us and drove his car away. We got a wrist watch off of him and some money.

We then went west of Westfield and headed for Kansas and we met a Whippet Coupe with two fellows in it and we swung across the road ahead of them and stopped them and I got in the car with them and made them turn around and took them to a school house just south of Kansas a little ways. I put a gun on them and made them drive the car to the school house. We took them into the school house and stripped the little fellow, tied both of them up got a watch or two, a ring or two and some money off of them and left the car in back of the school house.

We headed up towards Danville, Illinois, and dropped the car and went up through Valpariaso,

Respondent's Exhibit A—(Continued)

Indiana, and then back through Watseka and Gilman and just out of Gilman, north we drove along side of a car with four fellows in it, this was a Pontiac sedan. We turned them around and took them back north and east of Gilman to some little town and tied them up in a school house. Joe Hartman and I got into the car with the four fellows putting them in the back seat and Joe and I got in the front seat and drove the car. We got a ring, a watch or two and some money off of them. We left them in the school house and brought the car back to Gilman and left it there and came to Decatur.

Slim Wright, Joe Hartman, Carl Sanders, Smiles Bowles and I along with Monte Crist planned to do a job in Mattoon and wanted a truck and I was told where the truck was and they took me to where the truck was and I went and got it out of a garage or barn and we drove up the hard road to Westfield and when we got to Westfield the truck got on fire and we abandoned the truck in the middle of the street.

Monte Crist, Carl Sanders, Joe Hartman and I went to Charleston and Joe and I went in the depot of the Big Four and there was two fellows sleeping on the floor and one fellow sweeping up in the ticket office and I put a gun on the fellow that was sweeping and Joe Hartman put a gun on the two fellows on the floor and I made my man open up the safe and the cash drawer and got \$100.00 out of the safe and a 25 off of the window and a 32 off of the expressman and tied all of them up and put

Respondent's Exhibit A—(Continued)

them in back room and we left and came back to Decatur, Monte Crist and Carl Sander stayed in the car while Joe and I pulled the job.

/s/ ROBERT RAYMOND.

Witnesses:

/s/ C. A. THRIFT

/s/ VIRGIL BELCHER

/s/ H. O. COLDREN

/s/ L. E. STEPHENSON [158]

GOVERNMENT'S EXHIBIT No. 7

June 2, 1930

STATEMENT OF CECIL WRIGHT

I, Cecil Wright, being first informed by Special Agents A. M. Gladsteen and M. P. Scanlow of the U. S. Department of Justice of my constitutional right do hereby make the following statement voluntarily, free from duress and without threat or promises of immunity.

I am 24 years of age and was born at Charleston, Ill.

I first met Mark Bowles at Casey, Ill., about March 1, 1930. At that time I was with Monte Chris's gang.

I was released from Pontiac, Ill, Reformatory on April 28, 1927 on Parole. I was paroled to Pat Nacy of Mattoon, Ill. Later I was changed over to a Mr. Phillips of the Browns Shoe Factory, Mattoon, Ill. In the summer of 1928 I came to East

Respondent's Exhibit A—(Continued)

Chicago, Indiana, where I lived with my mother

C. W.

Mrs. Dora Wright. I worked around East Chicago, Ind., until about the first part of March 1930, when Monte Criss Bob Raymond and Ed Murray came to me and told me that I had violated my Illinois Parole and that I was wanted there. Criss promised me \$2000.00 in cash if I would go back to Mattoon, Ill., and join his gang—Criss gave me \$100. cash and promised to give me the rest later on. I never did get the \$1900—except about \$300 later on. [159]

Enroute to Mattoon, Ill., from East Chicago, Ind., Criss told me about robbing the Humboldt, Ill., bank and that he and Bob Raymond had pulled a robbery at the Sullivan, Ill., Armory—I saw the guns they got from the Armory job. There were 3 Rifles 10 Automatic Pistols—2 or 3 thousand

C. W.

rounds of rifle ammunition and 2 pair of field glasses and several gun cleaning outfits. Criss gave me a 45 Colt Automatic Pistol No. 304323 which was taken in the Sullivan, Ill., Armory job. Later on he gave one of the guns to Bowles. The serial number was filed off.

I was with the Criss gang about a month and a half. I accidentally shot myself in the left hand and while I was waiting for the hand to heal, Criss gave me a Ford Sedan to drive to East Chicago, Ind. The Ford is a stolen car and was stolen by Criss. I don't know where the car was stolen from.

Respondent's Exhibit A—(Continued)
ter of United States of America vs. Robert Raymond, et al., Criminal No. 11032, as fully as the same appear from the originals now on file and of record in my office as Clerk of said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of East St. Louis, in the District aforesaid, this 6th day of July, A. D. 1942.

(Seal)

D. H. REED,
Clerk. [162]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 162 pages, numbered from 1 to 162, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Cecil L. Wright, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Respondent, No. 28026, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$39.60, and that the said amount has been charged against the United States.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court at San Francisco, California, this 5th day of August, A.D. 1948.

(Seal)

C. W. CALBREATH,
Clerk. [163]

[Endorsed]: No. 12014. United States Court of Appeals for the Ninth Circuit. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellant, vs. Cecil L. Wright, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed August 5, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12014

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,
Respondent-Appellant,

vs.

CECIL L. WRIGHT,
Petitioner-Appellee.

ORDER EXTENDING TIME TO DOCKET

It appearing that on April 23, 1948, respondent-appellant filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit from an order and opinion of United States Circuit Judge William Denman entered that day discharging petitioner-appellee from the custody of said respondent-appellant, the then Warden of the United States Penitentiary at Alcatraz, California, and filed in the District Court of the United States for the Northern District of California in case number 28026, on motion of Joseph Karesh, Esq., Assistant United States Attorney for the Northern District of California, and good cause appearing therefor,

It Is Hereby Ordered that respondent-appellant herein may have to and including the 23rd day of

August, 1948, to docket the above-entitled case and file the record on appeal herein with the United States Court of Appeals for the Ninth Circuit.

Dated July 16, 1948.

/s/ FRANCIS A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed July 16, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED ON
IN APPEAL AND DESIGNATION OF CON-
TENTS OF RECORD TO BE PRINTED

James A. Johnston, Warden of the United States Penitentiary at Alcatraz Island, California, appellant herein, hereby designates the entire record filed with this Court as necessary for the consideration of the appeal, and the following constitute the points to be relied upon on appeal:

1. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, should have denied the petition for writ of habeas corpus filed by appellee before him.

2. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, erred when he ordered the appellee discharged from the custody of the appellant.

3. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, erred

when he found that the appellee had been denied the efficient (effective) assistance of counsel during the proceedings before the United States District Court for the Eastern District of Illinois in the case of United States of America vs. Tuck Wright, alias Cecil Wright, et al., Criminal Number 11,032.

4. That the sentence imposed against appellee by the United States District Court for the Eastern District of Illinois in the case of United States of America vs. Tuck Wright, alias Cecil Wright, et al., Criminal Number 11,032, is a valid existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed August 16, 1948. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

Excerpt from proceedings of Friday, August 27,
1948, at Seattle, Wash.

Present:

Honorable Clifton Mathews, Circuit Judge, Pre-
siding,

Honorable Albert Lee Stephens, Circuit Judge.

Honorable William Healy, Circuit Judge.

Honorable Homer T. Bone, Circuit Judge.

Honorable William E. Orr, Circuit Judge.

[Title of Cause.]

ORDER GRANTING MOTION OF APPEL-
LANT FOR SUBSTITUTION OF PARTY
APPELLANT

Upon consideration of the Motion of Appellant, filed August 25, 1948, for substitution of Edwin B. Swope, as Warden of the United States Penitentiary, Alcatraz, California, in the place and stead of the above-entitled appellant, and good cause therefor appearing, it is Ordered that said motion be, and hereby is granted, and said Edwin B. Swope, as said Warden, be, and he hereby is substituted in the place and stead of said James A. Johnston, Warden, etc., as party appellant in the above-entitled cause.

